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Collateral Children

CONSEQUENCE AND ILLEGALITY AT THE INTERSECTION OF FOSTER CARE AND CHILD SUPPORT

Daniel L. Hatcher[†]

INTRODUCTION

When children are removed from poor families and placed in foster care, federal law forces a collaboration between child welfare and child support agencies to pursue child support obligations against the children's parents.¹ But the children receive no benefit. Payments made in the name of child support are re-routed to the government coffers and converted into a funding stream to reimburse the government costs of providing foster care services.² The cost recovery requirement targets parents who are the least able to pay, whose children were often removed due to the circumstances of poverty and the neglect that results.³ Saddled with the additional child support obligation, the parents' struggles toward economic stability and family reunification are often derailed.⁴ Case plans required by federal law to aid reunification are illegally converted into debt-collection tools.⁵ If the parents fall behind, the government-owed debt can become a consideration, sometimes the sole factor, for the

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¹ See 42 U.S.C. § 671(a)(17) (2000).

² See generally OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUMAN SERVS., OEI-04-91-00530, CHILD SUPPORT FOR CHILDREN IN IV-E FOSTER CARE (1992) [hereinafter 1992 OIG REPORT], available at <http://oig.hhs.gov/oei/reports/oei-04-91-00530.pdf>.

³ See, e.g., DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 27 (2002) ("Poverty—not the type or severity of maltreatment—is the single most important predictor of placement in foster care and the amount of time spent there."); Naomi R. Cahn, *Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189, 1198 (1999) (describing the relationship between poverty and abuse and neglect); Martin Guggenheim, *The Foster Care Dilemma and What to Do About It: Is the Problem That Too Many Children Are Not Being Adopted out of Foster Care or That Too Many Children Are Entering Foster Care?*, 2 U. PA. J. CONST. L. 141, 145 (1999) ("[T]he link between child protection and poverty is staggering."); Barbara Bennett Woodhouse, *Child Abuse, the Constitution, and the Legacy of Pierce v. Society of Sisters*, 78 U. DET. MERCY L. REV. 479, 480 (2001) ("Too many children, especially children of color, are being removed from their homes because of poverty and its associated ills.").

⁴ Eve A. Stotland, *Resolving the Tension Between Child Support Enforcement and Family Reunification*, 35 CLEARINGHOUSE REV. 317, 321-22 (2001).

⁵ See 42 U.S.C. § 675(1)(B); 45 C.F.R. § 1356.21(b), (g)(4) (2007).

permanent seizure of their children through the process of terminating parental rights. Foster children become collateral, mortgaged to secure the debt for their own care.

Foster care cost recovery through child support enforcement is initiated under the requirements of Title IV-E of the Social Security Act.⁶ Federal foster care funding is available to state child welfare agencies when children are removed from low-income families and are thus "IV-E eligible."⁷ To receive the federal funds, Title IV-E requires an inter-agency partnership in an effort to generate government revenue equivalent to agency costs.⁸ Child support obligations are initiated against both mothers and fathers of foster children, and rather than using the payments for the children's benefit, the child support is assigned to the government to reimburse the costs of care.⁹ For foster children removed from well-off families, no such federally required process exists.¹⁰

This cost recovery process is a component of broad government efforts aimed at converting funds originally intended to benefit children into government revenue streams in order to reduce state spending on welfare and foster care services. The process mirrors welfare cost recovery policies that require parents applying for welfare assistance to initiate child support obligations against the noncustodial parents and assign resulting child support payments to the government.¹¹ Likewise, in addition to pursuing child support payments, child welfare agencies also seek to recover costs by taking control of foster children's Social Security benefits.¹² Although the Social Security benefits are intended to

⁶ 42 U.S.C. § 671(a)(17).

⁷ The specific IV-E eligibility requirements are more complicated than simply establishing the parents' income, but the purpose of the federal funding is clearly limited to providing assistance for foster children who come from poor families that would have been eligible for welfare assistance. See 42 U.S.C. § 670 (explaining the congressional purpose of enabling states to provide foster care services to children who otherwise would have been eligible for AFDC welfare benefits); 42 U.S.C. § 672 (setting out the specific eligibility requirements for states to receive foster care maintenance payments under Title IV-E).

⁸ The federal statute requires that "where appropriate, all steps will be taken, including cooperative efforts with the State agencies administering the program funded under part A of this subchapter and plan approved under part D of this subchapter, to secure an assignment to the State of any rights to support on behalf of each child receiving foster care maintenance payments under this part." 42 U.S.C. § 671(a)(17).

⁹ *Id.*

¹⁰ If a foster child is not eligible for IV-E payments, a state is not required by federal law to seek child support payments from the parents. However, even without the federal mandate, several states have established their own procedures that require parents of children in state-funded foster care to make child support payments in order to repay the state costs. See *infra* Part I.B.

¹¹ See generally Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029 (2007) [hereinafter Hatcher, *Child Support*] (providing a critical analysis of the history and present practices of welfare cost recovery).

¹² See Daniel L. Hatcher, *Foster Children Paying for Foster Care*, 27 CARDOZO L. REV. 1797, 1805-06 (2006) [hereinafter Hatcher, *Foster Children*] (discussing the legal and policy concerns of state agencies utilizing foster children's Social Security benefits to reimburse state costs).

help children suffering from disabilities or who have deceased or disabled parents, the agencies apply to become the children's representative payees and then re-direct the children's funds into the state coffers.¹³

Similar to the conflicts born out of these other cost recovery policies, the effort to recover foster care costs through child support enforcement diverts the child welfare agencies' missions. The overarching purpose of the child welfare system is to protect the welfare of children while simultaneously striving to strengthen and preserve families.¹⁴ The child support program is guided by the best interests of the child standard.¹⁵ However, through the forced intersection of the two programs in order to recover costs, a gear-grinding shift occurs that subverts the agencies' core missions to the cost recovery pursuit. The transposition of self-interested government financial interests over the agencies' primary goals leaves the programs in conflict and the parents and children ill-served.

Individual child welfare caseworkers often oppose the policy, expressing concern regarding parents' inability to pay and the impact on case-planning goals.¹⁶ Enforcing government-owed child support obligations frequently poses a significant barrier to parents' struggles to obtain economic stability and thus hampers the likelihood of family reunifications.¹⁷ Longer stays in foster care and weakened parent-child relationships often result, and the fiscal benefit to the government from the cost recovery efforts is uncertain. Because the parents of children in IV-E foster care are poor, child support payments are minimal, and the government's administrative costs in pursuing the payments weigh against the resulting collections.¹⁸

¹³ *Id.*

¹⁴ See, e.g., Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 642 (2006) ("The mission of the child welfare system is to protect children believed to be abused or neglected by their families and to strengthen families where children are at risk for abuse and neglect."); Jane M. Spinak, *Adding Value to Families: The Potential of Model Family Courts*, 2002 WIS. L. REV. 331, 340 (2002) (noting that "the role of the child welfare agency, whose primary mission is 'to ensure the safety and well-being' of children through the direct provision of assistance" (quoting New York City Administration for Children's Services, Mission & Organization, <http://www.nyc.gov/html/acs/html/about/mission.shtml> (last visited May 22, 2009))); see also 45 C.F.R. § 1355.25(a) (2007) ("The safety and well-being of children and of all family members is paramount. When safety can be assured, strengthening and preserving families is seen as the best way to promote the healthy development of children.").

¹⁵ Hatcher, *Child Support*, *supra* note 11, at 1033, 1037, 1040.

¹⁶ 1992 OIG REPORT, *supra* note 2, at 7 (noting that foster care workers express concern that "families of IV-E Foster Care children are too poor to pay," that "enforcing child support will be detrimental to the parent/child relationship" and "[t]hey do not believe that child support serves to stabilize the family unit and help insure its future integrity") (internal quotation marks omitted).

¹⁷ *Id.*; see *infra* Part II.A; see also Jane C. Murphy, *Protecting Children by Preserving Parenthood*, 14 WM. & MARY BILL RTS. J. 969, 973 (2006) (concluding that the broader child welfare rules and policies "promote the loss of birthmothers in poor children's lives, often with no long-term maternal substitute for affected children").

¹⁸ See *infra* Part II.C.

Legal concerns follow the policy concerns: imposing government-owed child support obligations upon foster children's parents often illegally conflicts with federal reunification and case-planning requirements.¹⁹ Plans intended to help parents safely reunify with their children are transformed into debt collection tools that make reunification less likely.²⁰ Impoverished parents are further impoverished, and if unable to keep up with the extra financial obligation, their children are not returned. And as the parents' economic struggles and reunification efforts falter, an unconstitutional practice emerges—severing the parent-child relationship for a government-owed debt. Although the relationships are constitutionally protected,²¹ the parents' substantive due process rights are overridden when cost recovery obligations are used as grounds to terminate parental rights.²²

For example, in North Carolina, an incarcerated father obtained an early release date through good behavior in the hopes of regaining custody of his young daughter.²³ The child welfare agency developed plans for reunification,²⁴ yet simultaneously sought to terminate parental rights because the father did not pay child support to reimburse the costs of foster care.²⁵ Although no child support order was in place to give him knowledge of any obligation to pay, and his only income from laboring

¹⁹ See 42 U.S.C. § 671(a)(15) (2000) (requiring reasonable efforts to safely reunify families); *id.* § 675(1) (describing the case plan requirements).

²⁰ See *infra* Part III.A.

²¹ See, e.g., *Santoksy v. Kramer*, 455 U.S. 745, 753 (1982) (recognizing the “fundamental liberty interest of natural parents in the care, custody, and management of their child”).

²² See, e.g., ALA. CODE § 26-18-7(b)(1) (1992 & Supp. 2008) (requiring court to consider as a factor the “[f]ailure by the parents to provide for the material needs of the child or to pay a reasonable portion of its support, where the parent is able to do so”); 13 DEL. CODE ANN. tit. 13, § 1103(a)(5) (1999 & Supp. 2008) (allowing the consideration of whether “respondent is not able or willing to assume promptly legal and physical custody of the child, and to pay for the child’s support, in accordance with the respondent’s financial means”); KAN. STAT. ANN. § 38-2269(c)(4) (2008) (requiring court to consider parent’s “failure to pay a reasonable portion of the cost of substitute physical care and maintenance based on ability to pay”); LA. CHILD. CODE ANN. art. 1015 (2004) (listing grounds for termination of parental rights [hereinafter “TPR”], including: “(4) Abandonment of the child by placing him in the physical custody of a nonparent, or the department, or by otherwise leaving him under circumstances demonstrating an intention to permanently avoid parental responsibility by any of the following: . . . (b) As of the time the petition is filed, the parent has failed to provide significant contributions to the child’s care and support for any period of six consecutive months”); MINN. STAT. ANN. § 260C.301(b)(3) (West 2007) (allowing TPR if “a parent has been ordered to contribute to the support of the child or financially aid in the child’s birth and has continuously failed to do so without good cause”); OR. REV. STAT. § 419B.506(1) (2007) (allowing TPR if a parent has failed “to provide care or pay a reasonable portion of substitute physical care and maintenance if custody is lodged with others”); R.I. GEN. LAWS § 15-7-7(a)(1) (2003) (allowing TPR when a “parent has willfully neglected to provide proper care and maintenance [support] for the child for a period of at least one year where financially able to do so”); TEX. FAM. CODE ANN. § 161.001(1)(f) (Vernon 2008) (allowing TPR if the parent has “failed to support the child in accordance with the parent’s ability during a period of one year ending within six months of the date of the filing of the petition”).

²³ *In re T.D.P.*, 595 S.E.2d 735, 742 (N.C. Ct. App. 2004).

²⁴ *Id.* at 742.

²⁵ *Id.* at 736.

in a prison kitchen was forty cents a day, the father lost his daughter for a government debt of \$72.80.²⁶

The case exemplifies the extreme result when the child welfare system's primary goals are subordinated to a focus on cost recovery, and unfortunately the case is not alone in its Dickensian approach.²⁷ As cash-strapped state agencies are directed to expand child support collection efforts in foster care cases,²⁸ and face continued federal pressure to develop practices in order to quickly terminate parental rights,²⁹ such examples of the child welfare agency's diverted mission will likely continue.

The legal crossroads of foster care and child support have been subject to very little scholarly exploration,³⁰ yet the legal and policy issues surrounding this intersection pose significant concerns to foster children, parents, and society. Part I of this Article begins the exploration by describing the framework of foster care cost recovery through child support enforcement, and describes the poverty correlation impacting parents and children in the child welfare system. Part II examines the impact on children, parents, and society when state agencies are sidetracked from serving children to pursue the fiscal goal of replenishing government revenue. Part III considers the several legal concerns that result. The Article concludes in Part IV by suggesting the elimination of the cost recovery practice, and includes suggested incremental reforms to begin ensuring that child welfare agencies are no longer diverted from serving child welfare goals.

²⁶ The opinion first explains that the father earned between forty cents and one dollar per day, but the dissent indicates the relevant income during the statutory period was apparently limited to forty cents per day. While discussing the parent's ability to pay during the statutory period, the dissent notes that "[a]fter his transfer . . . in May 2001, he was allowed to work in the kitchen at the tray window" and "he earned 40 cents a day or \$2.80 a week." Although no child support order was in place, if the father had been required to pay all of his earnings in child support, the maximum amount he could have paid during the statutory six-month period was \$72.80 (forty cents per day multiplied by 182 days in the 6-month period). *Id.* at 737, 740.

²⁷ See *infra* Part II.B.

²⁸ See ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., ACYF-CB-IM-07-06, INFORMATION MEMORANDUM (2007) [hereinafter ACF INFO. MEMO.], available at http://www.acf.hhs.gov/programs/cb/laws_policies/policy/im/2007/im0706.htm (directing state agencies to increase collaboration between foster care and child support agencies to pursue child support against parents of foster children).

²⁹ See, e.g., Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 729-30, 777-78; *id.* at 727 n.188 (describing the requirements and impact of the Adoption and Safe Families Act of 1997 (ASFA) and noting that "[e]very state has amended its abuse and neglect and termination of parental rights statutes to reflect ASFA's Mandates to promote termination of parental rights and adoption") (citing U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-00-1, STATES' EARLY EXPERIENCES IMPLEMENTING THE ADOPTION AND SAFE FAMILIES ACT 6 (1999)); Murphy, *supra* note 17, at 976 (describing a "shift from policies favoring reunification to policies encouraging quicker termination of parental (maternal) rights and adoption").

³⁰ Two articles published in the National Center on Poverty Law's *Clearinghouse Review* consider policy concerns of seeking child support from the parents of foster children. See Nancy S. Erickson, *Collection of Child Support Maintenance from "Custodial" Parents of Children in Foster Care: Is it "Appropriate?"*, 28 CLEARINGHOUSE REV. 34 (1994); Stotland, *supra* note 4.

I. FOSTER CARE COST RECOVERY THROUGH CHILD SUPPORT ENFORCEMENT

The purpose of the forced partnership between child welfare and child support agencies is simple: reimbursement of the government costs of providing foster care services. Likewise, the emotive reflex to the cost recovery pursuit is equally simple: parents that abuse and neglect their children should be legally responsible for the resulting foster care costs. However, the simplicity of the desire to hold the parents financially responsible yields to complex realities as the family circumstances are understood, the legal framework of the cost recovery practice is explored, and the funding and policy structures of the child welfare system are realized.

A. *The Poverty Correlation*

Children in foster care are not likely to come from rich families. Rather, a strong link exists between poverty and child maltreatment.³¹ The Third National Incidence Study of Child Abuse and Neglect found that children in families with annual incomes below \$15,000 were twenty-two times more likely to experience some form of maltreatment than children whose families earned \$30,000 or more per year.³² This poverty correlation doubles when considering only child neglect, and neglect is the most common type of maltreatment.³³ Of all maltreated children, almost two-thirds (64.1%) of the children suffered from neglect, compared to 16 % of the children who were physically abused.³⁴

The parents of children suffering from maltreatment present harsh portrayals of the causes and effects of poverty: former welfare

³¹ See, e.g., Kathleen A. Bailie, *The Other "Neglected" Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 FORDHAM L. REV. 2285, 2294-98 (1998); Cahn, *supra* note 3, at 1198; Dorothy E. Roberts, *Is there Justice in Children's Rights? The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112, 125-26 (1999).

³² ANDREA J. SEDLAK & DIANE D. BROADHURST, ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., EXECUTIVE SUMMARY OF THE THIRD NAT'L INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (1996), available at <http://www.childwelfare.gov/pubs/statsinfo/nis3.cfm>.

³³ *Id.* (explaining that children "in families with annual incomes below \$15,000 per year were . . . more than 44 times more likely to be neglected" than children whose families with annual incomes of \$30,000 or more); see also ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., NATIONAL SURVEY OF CHILD AND ADOLESCENT WELL-BEING: ONE YEAR IN FOSTER CARE: WAVE 1 DATA ANALYSIS REPORT 37, 42 (2003) [hereinafter NATIONAL SURVEY OF CHILD AND ADOLESCENT WELL-BEING], available at http://www.acf.hhs.gov/programs/opre/abuse_neglect/nscaw/reports/nscaw_oyfc/oyfc_report.pdf (finding that the majority of children were placed in foster care due to neglect, with approximately half of the neglectful circumstances categorized as "failure to provide," and that of the children placed in foster care due to neglect from the failure to provide, the primary reasons [accounting for over 90% of the failure to provide cases] were lack of adequate health care, food, or shelter).

³⁴ ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2006 ch. 3 (2008), available at <http://www.acf.hhs.gov/programs/cb/pubs/cm06/chapter3.htm>.

recipients fighting a losing battle for economic stability;³⁵ victims of domestic violence;³⁶ young parents who grew up in foster care repeating the cycle;³⁷ parents struggling with substance abuse;³⁸ homeless mothers unable to find shelter,³⁹ and families lacking access to health care.⁴⁰ State practices often treat such circumstances of poverty as grounds for child removal,⁴¹ and studies reveal that caseworker bias may increase the likelihood of removing a child from a low-income family.⁴²

The connection between poverty and foster care is further exacerbated by state and federal policies and by the overall funding structure of the child welfare system. To receive federal foster care funding, a state must obtain judicial determinations that the child welfare agency made “reasonable efforts” to prevent the necessity of child

³⁵ See Barbara Bennett Woodhouse, *Making Poor Mothers Fungible: The Privatization of Foster Care*, in *Child Care and Inequality: Rethinking Carework for Children and Youth*, in CHILD CARE & INEQUALITY: RETHINKING CAREWORK FOR CHILDREN & YOUTH 83, 96 (Francesca Cancian et al. eds., 2002) (“On one hand, we have the image of the middle class White mother, who can afford to donate her carework because her wage-earning husband supports her. On the other hand, we have the image of the poor Black or Brown welfare mother who must beg for handouts because she has neither a spouse nor a job in the wage economy. The first appears secure in her role as “mother”, whereas the second is fungible and constantly at risk of state intervention.”); see also Stotland, *supra* note 4, at 321 (explaining that child removal causes parents previously receiving welfare assistance to lose the benefit, increasing the economic difficulties).

³⁶ See, e.g., Jane C. Murphy & Margaret J. Potthast, *Domestic Violence, Substance Abuse, and Child Welfare: The Legal System’s Response*, 3 J. HEALTH CARE L. & POL’Y 88, 90 (1999); Bonnie E. Rabin, *Violence Against Mothers Equals Violence Against Children: Understanding the Connections*, 58 ALB. L. REV. 1109, 1110-11 (1995); Melissa A. Trepiccione, *At the Crossroads of Law and Social Science: Is Charging a Battered Mother with Failure to Protect Her Child an Acceptable Solution When Her Child Witnesses Domestic Violence?*, 69 FORDHAM L. REV. 1487, 1489 (2001).

³⁷ Clare Huntington, *Mutual Dependency in Child Welfare*, 82 NOTRE DAME L. REV. 1485, 1490 (2007) (“[T]he system is self-perpetuating. Research has begun to show the intergenerational cycle of foster care. Many parents of children in foster care today were once in foster care themselves.”). See generally JANE WALDFOGEL, *THE FUTURE OF CHILD PROTECTION: HOW TO BREAK THE CYCLE OF ABUSE AND NEGLECT* (1998).

³⁸ E. Michelle Tupper, *Children Lost in the Drug War: A Call for Drug Policy Reform to Address the Comprehensive Needs of Family*, 12 GEO. J. ON POVERTY L. & POL’Y 325, 336 (2005) (“Seven out of ten cases in the child welfare system are currently caused or worsened by substance abuse, but few court professionals have adequate training or understanding of addiction issues to address the situation appropriately.”).

³⁹ Huntington, *supra* note 37, at 1491; NAN P. ROMAN & PHYLLIS WOLFE, NAT’L ALLIANCE TO END HOMELESSNESS, *WEB OF FAILURE: THE RELATIONSHIP BETWEEN FOSTER CARE AND HOMELESSNESS* 9 (1995), available at <http://www.endhomelessness.org/content/article/detail/1285/> (follow “PDF” hyperlink).

⁴⁰ NATIONAL SURVEY OF CHILD AND ADOLESCENT WELL-BEING, *supra* note 33, at 107 (noting that of the caregivers from whom children were removed into foster care, “78% needed mental health services,” “90% needed Medicaid,” and 49% needed other health care services).

⁴¹ Cahn, *supra* note 3, at 1198-99.

⁴² See Emerich Thoma, *If You Lived Here, You’d Be Home Now: The Business of Foster Care, The Confusion of Poverty with Neglect*, 10 ISSUES IN CHILD ABUSE ACCUSATIONS (1998), available at http://www.ipt-forensics.com/journal/volume10/j10_10_13.htm (discussing studies indicating caseworker bias); see also Murphy, *supra* note 17, at 975 (noting that “[m]any commentators have suggested . . . that intervention results, at least in part, from the child welfare system’s adherence to the traditional idealized definition of the ‘good mother’ rather than from thorough investigations and documentation of child abuse and neglect” (quoting Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare “Reform,” Family, and Criminal Law*, 83 CORNELL L. REV. 689, 708-09 (1998))).

removal.⁴³ The requirement seemingly requires that the needs of low-income parents must be addressed before the drastic step of child removal is taken. But unfortunately, the “reasonable efforts” to provide needed services are usually inadequate.⁴⁴ A survey of child welfare workers found that former caregivers whose children were taken into foster care were in critical need of services at the time of removal, services including domestic violence counseling, child care assistance, housing and income assistance, access to health care, mental health services, and substance abuse treatment.⁴⁵ However, the needs of the caregivers were largely unmet.⁴⁶ For example, 62% of caregivers needed domestic violence services compared to only 15% who had their need met, and 71% needed housing assistance, while only 14% received the needed aid.⁴⁷

The funding structure of the child welfare system also contributes to the problem. Title IV-B federal funding, made available to provide services to help struggling families stay intact, is capped.⁴⁸ In contrast, Title IV-E funding provided to assist states with foster care costs after child removal is structured as an entitlement, and thus limited only by the number of eligible children.⁴⁹ In 2004, “[m]ore than \$5.8

⁴³ 42 U.S.C. § 671(a)(15)(B) (2000).

⁴⁴ See Esme Noelle DeVault, *Reasonable Efforts Not So Reasonable: The Termination of the Parental Rights of a Developmentally Disabled Mother*, 10 ROGER WILLIAMS U. L. REV. 763, 764-65 (2005) (describing the inadequacies of the reasonable efforts requirement); Deborah Paruch, *The Orphaning of Underprivileged Children: America's Failed Child Welfare Law & Policy*, 8 J.L. & FAM. STUD. 119, 135-39 (2006) (describing problems with the reasonable efforts requirement, including that federal law fails to define the term and insufficient funding has been provided); Roberts, *supra* note 31, at 115 (“Family preservation efforts often fail because they are inadequate: children are returned to troubled homes without assessing parents’ problems or providing the level or continuity of services required to solve them.”); see also PEW COMMISSION ON CHILDREN IN FOSTER CARE, *FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE* 13-14 (2004), available at <http://pewfostercare.org/research/docs/FinalReport.pdf> (explaining that insufficient funds are made available for reunification efforts or preventing the need for foster care).

⁴⁵ NATIONAL SURVEY OF CHILD AND ADOLESCENT WELL-BEING, *supra* note 33, at 107. (“Overall, child welfare workers indicated that 78% of caregivers needed income assistance, 70% needed employment services, 77% needed substance abuse services, 78% needed mental health services, 73% needed legal services; 62% needed domestic violence services; and 90% needed Medicaid. Housing services were needed by 71 % of caregivers and health care services were needed by 49% of the families . . .”).

⁴⁶ *Id.* at 108-13; see also Murphy, *supra* note 17, at 979 (“[L]ess than six out of ten children who are removed receive post-investigation services. Not only are services not provided through the narrowed ‘reasonable efforts’ requirement that remained under ASFA, poor families also experienced dramatic cutbacks in general public support throughout the post-ASFA period. The lack of services and strict timelines under ASFA has led to record numbers of mothers losing their status as parents through termination of parental rights.”).

⁴⁷ NATIONAL SURVEY OF CHILD AND ADOLESCENT WELL-BEING, *supra* note 33, at 108-13.

⁴⁸ See CYNTHIA ANDREWS SCARCELLA ET AL., *THE URBAN INST., THE COST OF PROTECTING VULNERABLE CHILDREN V: UNDERSTANDING STATE VARIATION IN CHILD WELFARE FINANCING* 14 (2006), available at http://www.urban.org/UploadedPDF/311314_vulnerable_children.pdf (explaining that Title IV-E provides “open-ended entitlements” whereas Title IV-B benefits are capped).

⁴⁹ *Id.*

billion in title IV-E funds” were made available to states, compared to \$693 million in Title IV-B funds.⁵⁰ Further, in addition to the funding discrepancy, Title IV-E payments are targeted so that states have a financial preference to remove foster children from poor families. States are only eligible to receive the IV-E funds on behalf of children removed from families that would have been eligible for welfare assistance.⁵¹ Private consultants are often hired to develop strategies to increase the “penetration rate”—the percentage of foster children who come from poor families and are thus eligible for the IV-E funds.⁵² Children in low-income families, already at greatly increased risk of being assessed for child maltreatment due to the circumstances of poverty, are further targeted because they are viewed as coming with money attached.

B. Legal Framework

Title IV-E of the Social Security Act,⁵³ the federal law that provides the largest federal funding source for state foster care programs,⁵⁴ requires enforcing child support obligations against the parents of foster children. When children are removed from low-income families and are thus “IV-E eligible,”⁵⁵ the child welfare and child support agencies must work together in order to pursue child support obligations against the parents.⁵⁶ A process for referring foster care cases for child support enforcement services is required, and support obligations are then initiated against the parents.⁵⁷ Any resulting payments are assigned to the government in order to reimburse the costs of foster care.⁵⁸

⁵⁰ *Id.* at 15, 20.

⁵¹ 42 U.S.C. § 672(a)(1) (2000).

⁵² Hatcher, *Foster Children*, *supra* note 12, at 1821; Susan Vivian Mangold, *Poor Enough to be Eligible? Child Abuse, Neglect and the Poverty Requirement*, 81 ST. JOHN’S L. REV. 575, 598 (2007).

⁵³ 42 U.S.C. § 671(a)(17).

⁵⁴ See SCARCELLA ET AL., *supra* note 48, at 14 (“Title IV-E, the largest funding stream, consists of the Foster Care and Adoption Assistance Programs, which are open-ended entitlements; the Chafee Foster Care Independence Program, which is a capped entitlement; and a non-entitlement funding authorization for education and training vouchers to youth who have aged out of foster care.”).

⁵⁵ The specific IV-E eligibility requirements are more complicated than simply establishing the parents’ income, but the purpose of the federal funding is clearly limited to providing assistance for foster children who come from poor families that would have been eligible for welfare assistance. See 42 U.S.C. § 670 (explaining the congressional purpose of enabling states to provide foster care services to children who otherwise would have been eligible for AFDC welfare benefits); *id.* § 672 (setting out the specific eligibility requirements for states to receive foster care maintenance payments under Title IV-E).

⁵⁶ *Id.* § 671(a)(17).

⁵⁷ *Id.*

⁵⁸ *Id.*

1. One Piece of the Cost Recovery Puzzle

Child support enforcement in foster care cases is part of a broader government focus on recovering the costs of assistance provided to low-income families and children; an effort that places the fiscal concerns of government agencies over the interests of those served.⁵⁹ The strategy of reimbursing foster care costs through child support occurs both within a more expansive, formalized framework of welfare cost recovery through the child support program and alongside an ad-hoc approach of state agencies to reimburse foster care costs by taking control of foster children's Social Security benefits.

First, similar to child support requirements in the foster care program, child support obligations are enforced against noncustodial parents to repay the costs of cash welfare assistance.⁶⁰ When custodial parents apply for welfare assistance through the Temporary Aid to Needy Families program (TANF), the parents must cooperate in pursuing child support obligations against the noncustodial parents and simultaneously agree to assign the rights to receive the payments to the government.⁶¹ These welfare cost recovery policies evolved from the historical federal intervention in child support that culminated in 1975, with the creation of the federal and state partnership under Title IV-D of the Social Security Act.⁶² From its outset, the IV-D child support program was used in part to provide child support payments to families, but the primary purpose of the program's creation was to recover the costs of government assistance.⁶³

In addition to the dual efforts to recover both foster care and welfare costs through child support enforcement, another foster care cost recovery method targets foster children's Social Security benefits.⁶⁴ Children may be eligible to receive Social Security benefits because they are either disabled or have deceased or disabled parents.⁶⁵ Although not intended as a state funding source, child welfare agencies have developed procedures to access the children's funds.⁶⁶ The agencies

⁵⁹ Hatcher, *Foster Children*, *supra* note 12, at 1807.

⁶⁰ See Hatcher, *Child Support*, *supra* note 11, at 1044-48; Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 345 (2005).

⁶¹ 42 U.S.C. §§ 608(a)(2)-(3), 654(29).

⁶² Social Services Amendments of 1974, Pub. L. No. 93-647, §§ 451-460, 88 Stat. 2337, 2351-58 (1975) (codified as amended at 42 U.S.C. §§ 651-660).

⁶³ See, e.g., HARRY D. KRAUSE, CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVE 318 (1981); Hatcher, *Child Support*, *supra* note 11, at 1041-42; Murphy, *supra* note 60, at 344 (noting that "the primary goal of modern child support law was to reduce welfare costs").

⁶⁴ See generally Hatcher, *Foster Children*, *supra* note 12.

⁶⁵ A child with a disabled or deceased parent may be eligible to receive Old-Age, Survivors, and Disability Insurance (OASDI) under Title II of the Social Security Act. 42 U.S.C. §§ 401-34. Children who themselves are disabled may be eligible to receive Supplemental Security Income (SSI) under Title XVI. 42 U.S.C. §§ 1381-1383f.

⁶⁶ Hatcher, *Foster Children*, *supra* note 12, at 1805-06.

screen children for possible eligibility for Social Security benefits, assist in the application process, and then take over management of the benefits by applying to become representative payees.⁶⁷ Once in control of the funds, the agencies side-step their fiduciary obligations by using the children's benefits to reimburse government costs rather than to support the children's individualized needs.⁶⁸

The cost recovery methods described above often overlap. For example, a foster child's mother may have received cash welfare assistance prior to her child's placement in foster care, resulting in the collection of child support payments from the noncustodial father⁶⁹ to repay the welfare agency costs and simultaneous child support collection efforts against both parents to repay the costs of foster care services.⁷⁰ Also, the same child may be eligible to receive Social Security benefits, which the child welfare agency will also pursue to reimburse costs.⁷¹ The result is a bureaucratic cost recovery puzzle that even many policy experts and practitioners do not attempt to solve. The next sections consider how foster care cost recovery through child support enforcement has come to form one of the ill-fitting pieces of the puzzle.

2. Historical Structure

Prior to Title IV-E, the federal aid program to states for foster care costs existed in Title IV-A of the Social Security Act, intertwined with the past Aid to Families with Dependent Children (AFDC) welfare program.⁷² The initial child support requirements for the combined AFDC and foster care program were vague. Added as part of the Social Security Amendments of 1967, the amended state plan provisions required states to develop a child support program and pursue child support for children receiving either AFDC or foster care benefits but did not specifically require assignment of the resulting child support obligations to the government.⁷³

⁶⁷ *Id.*

⁶⁸ *Id.* at 1806.

⁶⁹ This Article occasionally refers to absent parents simply as the noncustodial or absent fathers because custodial parents in single parent households are usually the mothers. However, the Article certainly recognizes that the mothers may also be the absent parents. See LILIANA SOUSA & ELAINE SORENSEN, THE URBAN INST., NEW FEDERALISM: NAT'L SURVEY AM.'S FAMILIES, THE ECONOMIC REALITY OF NONRESIDENT MOTHERS AND THEIR CHILDREN 1 (2006) [hereinafter THE URBAN INST.], available at http://www.urban.org/UploadedPDF/311342_B-69.pdf.

⁷⁰ *Id.* at 6; see also Hatcher, *Foster Children*, *supra* note 12, at 1807-08.

⁷¹ THE URBAN INST., *supra* note 69, at 5-6; see also Hatcher, *Foster Children*, *supra* note 12, at 1805-06.

⁷² The federal foster care aid, then titled "Payments to States for Foster Home Care of Dependent Children" was included under the AFDC benefit definition so that any reference to AFDC also included the foster care benefits. 42 U.S.C. § 608(b) (1970 ed.) ("[T]he term 'aid to families with dependent children' shall, notwithstanding section 606(b) of this title, include also foster care on behalf of a child described in paragraph (a) of this section.").

⁷³ Social Security Amendments of 1967, Pub. L. No. 90-248, § 201(a)(1), 81 Stat. 821, 878-79 (1968) (relevant sections codified at 42 U.S.C. § 602(a)(17) (1970)); see Jacqueline M.

Then, in legislation that became effective in 1975, Congress created a new part D to Title IV of the Social Security Act that established a child support program financed by, and run in partnership between, the federal and state governments—commonly referred to today as the IV-D child support program.⁷⁴ The new Title IV-D legislation included more specific provisions aimed at reimbursing costs of government welfare and foster care assistance, requiring that applicants or recipients of assistance assign their child support rights to the government and cooperate in establishing and enforcing the government-owed child support obligation.⁷⁵ Thus, the first federal foster care cost recovery requirements began in 1975, simultaneously with the first formalization of the welfare cost recovery rules for families applying for AFDC welfare assistance.

A transition occurred five years later, through the Adoption Assistance and Child Welfare Act of 1980, when the program of federal foster care financial assistance was pulled from the AFDC program and transferred to a new Title IV-E of the Social Security Act.⁷⁶ In 1984, Congress inserted language into Title IV-E that formed the basis of foster care cost recovery through child support enforcement that continues today. The following requirement was imposed upon state child welfare agencies:

[W]here appropriate, all steps will be taken, including cooperative efforts with the State agencies administering the program funded under part A of this subchapter and plan approved under part D of this subchapter, to secure an

Fontana, *Cooperation and Good Cause: Greater Sanctions and the Failure to Account for Domestic Violence*, 15 WIS. WOMEN'S L.J. 367, 370-71 (2000) (explaining how the early AFDC rules initially did not require applicants to cooperate with child support offices or to assign their child support rights to the government).

⁷⁴ Social Services Amendments of 1974, Pub. L. No. 93-647, § 101(a), 88 Stat. 2337, 2351-52 (1975); Fontana, *supra* note 73, at 372; Hatcher, *Child Support*, *supra* note 11, at 1033; Murphy, *supra* note 60, at 345.

⁷⁵ Social Services Amendments of 1974 § 101(a), 88 Stat. at 2351-55 (relevant sections codified at 42 U.S.C. § 608(a)(2)-(3) (2000)).

⁷⁶ S. REP. NO. 98-387 (1984), as reprinted in 1984 U.S.C.C.A.N. 2397, 2432. A hiccup in the cost recovery efforts occurred at this time because the child support assignment and cooperation requirements that resided in IV-A were left behind—likely inadvertently—in the transition to Title IV-E. *See id.*, 1984 U.S.C.C.A.N. at 2431-32. The report explains the law at the time:

Present law.—The Federal statute does not require State child support agencies to undertake collection of child support on behalf of children who are placed in foster care under title IV-E of the Social Security Act. In addition, there is no requirement that State foster care agencies attempt to secure an assignment to the State of rights to support on behalf of children receiving foster care maintenance payments under the IV-E foster care program. These requirements were deleted when the foster care program was transferred from title IV-A to title VI-E by the Adoption Assistance and Child Welfare Act of 1980 (P.L. 96-272).

Id.

assignment to the State of any rights to support on behalf of each child receiving foster care maintenance payments under this part.⁷⁷

Discretion is built into the federal law, allowing the agencies to decide if some foster care cases may not be appropriate for child support enforcement. However, as the next section explains, such discretion is often not exercised.

3. Discretion Ignored

Title IV-E's "where appropriate" clause has been interpreted by the U.S. Department of Health and Human Services as providing states with flexibility to consider the children's interests and family circumstances before referring a foster care case for child support enforcement. Federal guidance explains that "[s]tates are required to refer children receiving title IV-E foster care to title IV-D for child support enforcement, but are afforded some degree of flexibility by title IV-E in determining which cases are appropriate for referral."⁷⁸ "To determine if a case is 'appropriate' to refer to the title IV-D agency," the guidance continues, "the State should evaluate it on an individual basis, considering the best interests of the child and the circumstances of the family."⁷⁹ Suggested factors include whether reunification is a goal and whether the state-owed child support obligation would be a barrier to reunification.⁸⁰

States vary widely in their adherence to the suggested factors. Some states have implemented policies to take full advantage of the federal flexibility by including a broad focus on the children's best interests and reunification concerns,⁸¹ and other states allow exceptions to the referral requirement in more limited circumstances, such as when domestic violence is a threat.⁸² However, despite the suggested

⁷⁷ 42 U.S.C. § 671(a)(17). The current language is substantially similar to the 1984 statutory language. *See* Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, § 11, 98 Stat. 1317, 1318 (1986) (codified as amended in scattered sections of 42 U.S.C.).

⁷⁸ U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, CHILD WELFARE POLICY MANUAL § 8.4C (2009), *available at* http://www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=170 (follow "Entire Manual" hyperlink).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *See, e.g.*, CAL. FAM. CODE § 17552 (West 2004) (California statute requiring consideration of the effect on reunification prior to referral of foster care case for child support enforcement); OHIO REV. CODE ANN. § 2151.361 (West 2007) (same); R.I. DEP'T OF CHILDREN, YOUTH AND FAMILIES, POLICY 100.0040, CHILD SUPPORT ENFORCEMENT FOR CHILDREN IN DCYF CARE 1 (2004), *available at* <http://www.dcyf.state.ri.us/docs/finalchldsupport.pdf> ("DCYF is afforded some degree of flexibility in determining which cases are appropriate for referral. The DCYF worker and supervisor determine if a case is appropriate to refer to the title IV-D agency on an individual basis, considering the best interests of the child and the circumstances of the family.").

⁸² *See, e.g.*, 10A N.C. ADMIN. CODE 70B.0104(a) (2009) ("The county director of social services must refer recipients of foster care assistance payment to the child support enforcement program" unless determining the referral is not appropriate due to physical or emotional harm, the child was conceived as a result of rape or incest, or legal proceedings for adoption are pending.).

discretion, many states do not provide for any consideration of the children's interests, possible conflicts with reunification efforts, or any other concerns in determining whether to initiate child support obligations in foster care cases. Rather, referrals for child support enforcement services are required regardless of any harm that might result.⁸³

4. IV-E Foster Care Versus State-Funded Foster Care

As children enter foster care, state child welfare agencies scramble to seek federal financial assistance through Title IV-E federal foster care maintenance payments. The agencies must meet complex eligibility rules,⁸⁴ including the requirement that children must have been removed from low-income households that would have been eligible for welfare assistance.⁸⁵ The IV-E eligibility decision is significant because it determines whether or not the federal government will subsidize the state costs of providing foster care services.⁸⁶ Also, the decision is determinative of whether the cost recovery process is required. Whereas federal law requires cooperative efforts between foster care and child support agencies to "secure an assignment to the State of any rights to support on behalf of each child receiving foster care maintenance payments" under Title IV-E, no such requirement exists for foster children who are not IV-E eligible.⁸⁷

However, although not mandated, states are still encouraged to pursue child support from the parents of children in state-funded foster care who are not IV-E eligible.⁸⁸ The legal framework for cost recovery

⁸³ See, e.g., MD. CODE REGS. 07.02.11.26(C) (2009) (requiring that the "local department shall: (1) Initiate child support for every child in out-of-home placement; and (2) Pursue support enforcement activity for both absent parents unless" the parents legal rights have been terminated); 466 NEB. ADMIN. CODE § 21-002-01J1 (2007) ("In all ADC and foster care IV-D cases in which there is not a court order for child support, the case must be referred to the county/authorized attorney to obtain an order for support."); 40 TEX. ADMIN. CODE § 700.1108(a) (2009) ("Unless parental rights are terminated, the Texas Department of Protective and Regulatory Services (PRS) must ask the county or district attorney to include a request for child support and health insurance in every petition for managing conservatorship and substitute-care placement, including court-ordered placements.");

⁸⁴ 42 U.S.C. § 672 (2000).

⁸⁵ *Id.*; see also Hatcher, *Foster Children*, *supra* note 12, at 1821-22; Mangold, *supra* note 52, at 580-81.

⁸⁶ In addition to Title IV-E payments, state child welfare programs may be financed by a wide variety of sources, including multiple federal, state and local funding sources. For a description of the multiple funding sources, see SCARCELLA ET AL., *supra* note 48, at 14-27.

⁸⁷ 42 U.S.C. § 671(a)(17); see also ACF INFO. MEMO., *supra* note 28, at 6 (explaining that 42 U.S.C. § 671(a)(17) does not provide authority for states to secure assignments of child support on behalf of foster children who are not eligible for IV-E payments).

⁸⁸ OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUMAN SERVS., OEI-04-91-00980, CHILD SUPPORT FOR CHILDREN IN STATE FOSTER CARE, at ii, 13 (1994), available at <http://oig.hhs.gov/oei/reports/oei-04-91-00980.pdf>. Although the percentage of non-IV-E cases receiving child support services was reported as low, the OIG report provides evidence of the collection efforts in state-funded foster care cases. *Id.* at 5. No national data has been compiled regarding such collections since this report, but the numbers have likely increased.

in state-funded foster care cases is informal. Rather than existing in statute or regulation, as in IV-E cases, the process is pieced together through informal agency communications. A series of federal directives issued between 1992 and 2007, titled “Information Memoranda, Action Transmittals, and Policy Interpretation Questions,” instruct child welfare agencies in how to use the IV-D child support program for state-funded foster care cost recovery efforts, despite the lack of legislative authority to do so.⁸⁹

Thus, the current legal structure both formally and informally encourages child support enforcement efforts in foster care cases: In IV-E cases, the child welfare agencies must refer all “appropriate” cases for child support enforcement in order to adhere to federal law, and federal guidance continues to allow use of the IV-D child support enforcement services in state-funded foster care cases. While inter-agency collaboration is often very much needed, the resulting partnership between the child welfare and child support agencies is diverting attention from the agencies’ core missions.

II. CONFLICTING COLLABORATION

The primary goals of child welfare agencies are both to protect the interests of children and simultaneously strengthen and preserve families.⁹⁰ When removal of children is necessary, the agencies provide care for the children and services to the parents in order to assist with their reunification efforts. However, the children’s interests are set aside and the reunification efforts often derailed through the forced collaboration with child support agencies to recover the costs of the foster care services. This cost recovery focus diverts the agencies’ missions to a bureaucratic effort of replenishing government revenue.⁹¹ The shift does not occur smoothly.

A. *Child Welfare’s Diverted Mission*

When a child enters foster care and the cost recovery mechanism begins, another process springs to life that will ultimately determine the fate of the parent-child relationship. A blur of multiple court proceedings, caseworker visits and reports, meetings with attorneys and guardian ad litem, therapy and counseling sessions, parenting classes, and medical and psychological assessments surround the child and parents. Somewhere in the mix, the interests of the child and parents are

⁸⁹ See *infra* Part III.C.3.

⁹⁰ See Huntington, *supra* note 14, at 640; Sarah H. Ramsey, *Children in Poverty: Reconciling Children’s Interests with Child Protective and Welfare Policies: A Response to Ward Doren and Roberts*, 61 MD. L. REV. 437, 443-44 (2002) (discussing the split mission of the child welfare system, serving both parents and children); Spinak, *supra* note 14, at 335-46.

⁹¹ See, e.g., 42 U.S.C. § 671(a)(17).

hopefully given significant consideration, but a powerful force backed by financial incentives and statutory requirements is constantly pushing the entire process on a course towards terminating parental rights as quickly as possible.

In 1997, the child welfare program underwent significant policy realignment with the enactment of the Adoption and Safe Families Act (ASFA).⁹² The prior programmatic focus on family reunification was not eliminated, but ASFA instituted a heightened effort to promote adoptions.⁹³ Out of concern for children languishing in the foster care system, ASFA imposed new requirements on state foster care agencies, along with financial rewards, in order to expedite adoptions.⁹⁴ Because parental rights must be terminated before adoption can occur, ASFA set short time limits for states to begin the termination process.⁹⁵ States responded quickly to implement the new requirements, influenced by the substantial financial award for each finalized adoption and no similar financial incentive to work towards reunification.⁹⁶

Despite the changes brought by ASFA, the provision of reunification services has continued as a primary child welfare agency mission—albeit with limitations. “[R]easonable efforts” are required “to preserve and reunify families.”⁹⁷ Prior to placement in foster care, child welfare agencies are required to provide services “to prevent or eliminate the need for removing the child from the child’s home.”⁹⁸ If child removal occurs, reunification services are required “to make it possible for a child to safely return to the child’s home.”⁹⁹ However, in aggravated

⁹² Adoption and Safe Families Act of 1997 (ASFA), Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.).

⁹³ See Morgan B. Ward Doran & Dorothy E. Roberts, *Welfare Reform and Families in the Child Welfare System*, 61 MD. L. REV. 386, 404 (2002) (explaining that “ASFA radically transformed the focus of federal child welfare policy” by shifting away from the “emphasis on family reunification that characterized its predecessor, the Adoption Assistance and Child Welfare Act of 1980 (AACWA),” to a “legislatively mandated preference for adoption”); Barbara Bennett Woodhouse, *Ecogenerism: An Environmentalist Approach to Protecting Endangered Children*, 12 VA. J. SOC. POL’Y & L. 409, 410 (2005) (“The Adoption and Safe Families Act of 1997 (ASFA) represented a major ideological shift in child welfare policy away from long term foster care and toward involuntary dissolution of old families and creation of new families.”).

⁹⁴ See Doran & Roberts, *supra* note 93, at 338; Vivek S. Sankaran, *Innovation Held Hostage: Has Federal Intervention Stifled Efforts to Reform the Child Welfare System?*, 41 U. MICH. J.L. REFORM 281, 292 (2007).

⁹⁵ 42 U.S.C. § 675(5)(E) (With some exceptions for shortening or lengthening the time period, the law requires that “in the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months . . . the State shall file a petition to terminate the parental rights . . .”).

⁹⁶ *Id.* § 673(b); Sacha Coupet, *Swimming Upstream Against the Great Adoption Tide: Making the Case for “Impermanence,”* 34 CAP. U. L. REV. 405, 408 (2005) (describing the financial incentive structure); Christina White, *Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act*, 1 NW. J. L. & SOC. POL’Y 303, 336 (2006) (“The ASFA provides financial incentives to terminate the rights of black parents and place their children up for adoption, but no financial support for programs to reunify their families.”).

⁹⁷ 42 U.S.C. § 671(a)(15).

⁹⁸ *Id.*

⁹⁹ *Id.*

circumstances, such as instances of severe abuse or the murder of a sibling by the parent, reunification services are not required.¹⁰⁰ Also, unless certain conditions are met, ASFA imposes a time limit for parents to successfully achieve reunification by requiring states to initiate termination of parental rights proceedings as soon as a child has been in foster care for fifteen of the most recent twenty-two months.¹⁰¹ Moreover, “concurrent planning” is also allowed under the Act, permitting child welfare agencies to actively pursue adoption while simultaneously providing the required reunification services.¹⁰²

Thus, a core mission of the child welfare system continues to be strengthening and preserving families. ASFA limits the required services, and adds a focus on promoting adoption, but reunification services continue as a central component of required case-planning goals.¹⁰³ However, with the insertion of the government’s cost recovery pursuit into the mix, the remaining reunification requirements are often subverted. Already impoverished parents are further burdened by government-owed child support obligations, hampering their struggle to reunify with their children.

B. *The Consequences: Cost Recovery Versus Family Reunification*

The majority of children taken into foster care are removed from their parents due to the circumstances of poverty.¹⁰⁴ Further, the policies and funding structure of the child welfare system encourage child removal rather than preventive services,¹⁰⁵ and federal law limits the time period for reunification services.¹⁰⁶ Yet for some parents, hope remains.

¹⁰⁰ *Id.* § 671(a)(15)(D)(i)-(iii); see also *Unified Family Courts and the Child Protection Dilemma*, 116 HARV. L. REV. 2099, 2115 (2003) [hereinafter *Unified Family Courts*] (describing the various limitations on reunification requirements under ASFA).

¹⁰¹ 42 U.S.C. § 675(5)(E); Murphy, *supra* note 17, at 976-77; *Unified Family Courts*, *supra* note 100, at 2115.

¹⁰² 42 U.S.C. § 671(a)(15)(F); *Unified Family Courts*, *supra* note 100, at 2116.

¹⁰³ See Deborah L. Sanders, *Toward Creating a Policy of Permanence for America’s Disposable Children: The Evolution of Federal Foster Care Funding Statutes from 1961 to Present*, 29 J. LEGIS. 51, 75-76 (2002); Woodhouse, *supra* note 93, at 419 (explaining that further amendments after ASFA “sought to improve not only the procedure through which adoptions would be secured . . . , but also reinforced ASFA’s original goal of engendering ‘community-based family support services, family preservation services, [and] time-limited family reunification services’” (quoting Pub. L. No. 107-133, § 101, 115 Stat. 2413, 2414 (2002))) (third alteration in original). Sanders explains that:

ASFA has not abandoned the family preservation model, but merely subordinated it to child safety and permanency timeline goals. The operative reasonable efforts language still requires that agencies continue to work toward eliminating a need for removal or reunification unless one of the two ASFA exceptions, either the existence of aggravating circumstances, or the exhaustion of reasonable efforts, is met.

Sanders, *supra*, at 75-76.

¹⁰⁴ See *supra* notes 31-33 and accompanying text.

¹⁰⁵ See *supra* notes 43-48 and accompanying text.

¹⁰⁶ See 42 U.S.C. § 675(5)(E).

After their children are removed, agency caseworkers may attempt to break through the bureaucratic barriers,¹⁰⁷ actively seek to develop a relationship of trust with the parents, and develop cooperative case-plans to work toward the families' reunification.¹⁰⁸ For example, if the circumstances leading to child removal included lack of housing, unemployment, and substance abuse, the caseworker may arrange needed service referrals for the parents to search for suitable housing, participate in a drug treatment program, and complete job training to help find stable employment.

The years of poverty's effects are not easily overcome, but with caseworker assistance the parents can make gradual steps towards meeting the agency's requirements for reunification. However, just when the parents' personal and economic circumstances are the most vulnerable, and the need for agency assistance the greatest, the child welfare agency's role as social services provider is abruptly overlaid with the task of debt collector. As the agencies follow the requirements to refer cases for child support enforcement actions in order to recover government costs,¹⁰⁹ the parents are saddled with new, and often unrealistic, debt payments that can further destabilize the economic picture and undermine their reunification efforts.¹¹⁰

Very little attention has been paid to the logistics or results of the government effort to pursue, and keep, child support payments from parents of children in foster care. The policy was initially an afterthought, tacked on to the government's related but broader interest in pursuing child support against absent fathers to reimburse the costs of welfare benefits provided to their children.¹¹¹ Even when the requirement was separated from the broader welfare cost recovery efforts in 1984,¹¹² little attention was paid to state implementation of the child support requirements related to children in foster care. Then, in 1992, the U.S. Department of Health and Human Services Office of Inspector General (OIG) investigated state practices and completed a report calling for improved coordination between foster care and child support agencies.¹¹³

Although child support for children in foster care is used to reimburse government costs rather than to assist the children, the OIG

¹⁰⁷ See Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race and Class in the Child Protection System [An Essay]*, 48 S.C. L. REV. 577, 600-03 (1997) (discussing the bureaucratic problems that reduce the effectiveness of reunification services).

¹⁰⁸ 42 U.S.C. § 675(1)(b); 45 C.F.R. § 1356.21(b), 1356.21(g)(4) (2007).

¹⁰⁹ 42 U.S.C. § 671(a)(17).

¹¹⁰ See Hatcher, *Child Support*, *supra* note 11, at 1074-79 (describing the difficulty of low-income child support obligors to keep up with required child support payments); Stotland, *supra* note 4, at 321 (describing the negative impact of child support enforcement efforts in foster care cases on reunification goals).

¹¹¹ See *supra* Part I.B.1.

¹¹² S. REP. NO. 98-387, at 35-36 (1984), as reprinted in 1984 U.S.C.C.A.N. 2397, 2432.

¹¹³ See 1992 OIG REPORT, *supra* note 2, at i-ii (noting the low child support collection rates for foster children at the time of the report and recommending collaboration for referrals of foster care cases for child support enforcement); see also *id.* at ii-iii.

asserted that children receive benefits from child support enforcement services and were thus deprived by inadequate child support referrals: “[C]hildren in IV-E Foster Care are being deprived the opportunity to receive IV-D Child Support services they are entitled to receive.”¹¹⁴ The contradictory nature of the assertion is readily apparent, because child support collections in foster care cases do not benefit the children.¹¹⁵ However, the OIG contended that foster children benefit indirectly, through paternity establishments that may trigger possible inheritance and insurance rights and “possibly vital information regarding genetically-linked medical problems.”¹¹⁶ Further, the report claimed, “without the absent parent(s) being located, the child cannot form social relationships with the parent(s).”¹¹⁷

The OIG’s self-constructed, positive view of child support services for foster children was not shared by caseworkers or the child welfare agency’s leadership. As the report itself recognized, caseworkers often “expressed opinions that families of IV-E Foster Care children are ‘too poor to pay,’” and “that enforcing child support will be detrimental to the parent/child relationship.”¹¹⁸ The caseworkers “do not believe that child support serves to stabilize the family unit and help insure its future integrity.”¹¹⁹ The concern most often expressed regarding enforcement of child support obligations in foster care cases was related to family reunification.¹²⁰ Responding to the OIG report, the U.S. Department of Health & Human Service’s (HHS) Assistant Secretary for Planning and Evaluation (ASPE) did not mince words regarding the concern:

I believe your draft does not address several important issues, and therefore oversimplifies the extent to which Child Support collections for foster care children can or should be pursued The report does not adequately address the real and perceived conflicts between the activities and goals of the IV-D program (maximizing collections) and those of the IV-E program (maximizing family reunification).¹²¹

In fact, the OIG recognized the conflicting goals, but in the context of frustration with low child support-enforcement numbers. Explaining that the “focus and approach of IV-E Foster Care and IV-D Child Support agencies varied considerably,” the report placed blame for infrequent child support enforcement referrals on the foster care caseworkers’ desire to actually help their clients:¹²²

¹¹⁴ *Id.* at 5.

¹¹⁵ *See supra* Part I.B.

¹¹⁶ 1992 OIG REPORT, *supra* note 2, at 6.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 7.

¹¹⁹ *Id.*

¹²⁰ *See id.*

¹²¹ *Id.* at app. E.

¹²² *Id.* at 7.

Foster care staff are oriented to talk and in terms of an individual child. They form interpersonal relationships with the families they serve. On the other hand, most IV-D Child Support Staff view themselves as adversaries of “absent parents.” The child support staff tend to be “bottom line oriented.”¹²³

The focus on the bottom line won out in the OIG’s view, as the core thrust of the report called for improved collaboration with child support staff in order to increase child support enforcement in foster care cases.¹²⁴ Regarding the reservations expressed by HHS leadership, the OIG acknowledged but quickly disregarded the concerns: “We agree that child support should only be pursued in ‘appropriate’ cases. However, we continue to believe that the majority of children in foster care can benefit from IV-D Child Support services, such as paternity establishment and locating absent parents.”¹²⁵

Under the lens of the economic realities confronting foster children’s parents, the arguments in favor of increased child support services in foster care cases do not withstand scrutiny. The majority of child removals occur due to the circumstances of family poverty.¹²⁶ Child support enforcement efforts against these low-income families result in no financial support to the children, conflicts with family reunification efforts, and can damage the relationship between caseworker and client.¹²⁷ In fact, while advocating the need for increased child support enforcement services for foster children, the OIG used as an example a case where the child support referral harmed the reunification efforts:

In one case, the parent and foster care worker established sufficient trust to allow a child to return home. However, at about the same time, a IV-D Child Support agent served a summons to bring the parent to court. The parent’s anger at the ‘government’ damaged the reunification process.¹²⁸

Moreover, at a time when the child welfare system hopes to increase the involvement of absent fathers in their children’s lives,¹²⁹ increased child support enforcement efforts will likely have the reverse effect.¹³⁰ Pursuing government-owed child support often further alienates parents from each other and causes the noncustodial fathers to further

¹²³ *Id.*

¹²⁴ *Id.* at ii.

¹²⁵ *Id.* at iii.

¹²⁶ See *supra* notes 31-33 and accompanying text.

¹²⁷ See generally Stotland, *supra* note 4 (describing the tensions between child support enforcement for foster children and efforts to reunify the children with their parents).

¹²⁸ 1992 OIG REPORT, *supra* note 2, at 8.

¹²⁹ See generally U.S. DEP’T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAM., WHAT ABOUT THE DADS? CHILD WELFARE AGENCIES’ EFFORTS TO IDENTIFY, LOCATE AND INVOLVE NONRESIDENT FATHERS (2006), available at <http://aspe.hhs.gov/hsp/06/cw-involve-dads/report.pdf> (providing detailed analysis of child welfare agency efforts to engage absent fathers and expressing the desire to increase involvement of the fathers of children in foster care).

¹³⁰ See Hatcher, *Child Support*, *supra* note 11, at 1079-82.

retreat from the agency in pursuit.¹³¹ If the first hand reaching out turns to slap an absent father with an unmanageable child support order,¹³² suspended driver's license,¹³³ the threat of incarceration due to contempt,¹³⁴ and garnishment of sixty-five percent of his take home pay for an obligation that will not help his child¹³⁵—the result will not be positive.¹³⁶

Finally, the assertion that foster children benefit from child support enforcement actions through the identification and location of their absent parents is based upon an incorrect premise.¹³⁷ A full referral for child support enforcement is not necessary for a foster child to receive paternity establishment or parental location services.¹³⁸ As HHS recently explained in a 2007 Information Memorandum, federal law specifically permits child welfare agencies to request parental location assistance from IV-D child support offices without actually referring foster care cases for child support enforcement.¹³⁹ Similarly, child welfare agencies can pursue paternity determinations on their own initiative, without necessitating the initiation of child support obligations.¹⁴⁰

Thus, because enforcing foster care cost recovery debts through child support enforcement does not yield benefits to children, the only

¹³¹ *Id.* at 1079, 1081; Murphy, *supra* note 60, at 362-65; see also Lisa Kelly, *If Anybody Asks You Who I Am: An Outsider's Story of the Duty to Establish Paternity*, 6 YALE J.L. & FEMINISM 297 (1994) (describing the paternity/child support docket, including the negative impact on the relationship between the parents by forcing the mother to pursue child support in order to receive welfare assistance).

¹³² See, e.g., Karen Syma Czapanskiy, *ALI Child Support Principles: A Lesson in Public Policy and Truth-Telling*, 8 DUKE J. GENDER L. & POL'Y 259, 261-62 (2001) (discussing possible negative effects when child support obligations are set too high for low-income obligors); Murphy, *supra* note 60, at 353-55 (explaining child support orders are often unrealistically high for low-income fathers).

¹³³ 42 U.S.C. § 666(a)(16) (2000) (federal law requiring states to develop procedures to suspend driver's licenses as a child support enforcement tool).

¹³⁴ See, e.g., MD. CONST. art. III, § 38 (Similar to other state constitutions, Maryland's constitution generally prohibits incarceration for a debt but explains that "support of a spouse or dependent children, or for the support of an illegitimate child or children, or for alimony . . . shall not constitute a debt within the meaning of this section.").

¹³⁵ 15 U.S.C. § 1673(b)(2) (2006).

¹³⁶ In addition to negative impact on the family relationships, the enforcement of child support obligations against low-income fathers can cause retreat from the above-ground workforce. See PETER EDELMAN ET AL., RECONNECTING DISADVANTAGED YOUNG MEN 19 (2006). In addition to several other factors that have caused a decline in workforce participation among young African-American men, the authors conclude that child support enforcement policies are a contributing factor. *Id.*

¹³⁷ See 1992 OIG REPORT, *supra* note 2, at 5.

¹³⁸ See *id.* at 5-6.

¹³⁹ U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAM., INFORMATION MEMORANDUM, ACYF-CB-IM-07-06 7-8 (2007), available at http://www.acf.hhs.gov/programs/cb/laws_policies/policy/im/2007/im0706.pdf; see also 42 U.S.C. § 653(c)(4) (2000).

¹⁴⁰ See, e.g., MASS. GEN. LAWS ANN. ch. 209C, § 5 (West 2008) (explaining that "[c]omplaints under this chapter to establish paternity . . . may be commenced by . . . the authorized agent of the department of social services or any agency licensed under chapter twenty-eight A provided that the child is in their custody").

remaining impact, other than the government's own fiscal interest, is harm. And as the next section explains, even the fiscal benefit to the government is in doubt.

C. The Economics: What Little We Know About the Numbers

Very little is known regarding the effectiveness of child support enforcement in foster care cases. In its 1992 report, the OIG predicted potentially significant government savings, but the analysis was based upon uncertain data.¹⁴¹ Little consideration has been paid to the issue since.

The OIG concluded that the cost recovery policy would result in fiscal success through an improved partnership between child welfare and child support agencies.¹⁴² However, the report's projected government savings initially failed to consider administrative costs. An HHS response cautioned that "[t]he amount of savings potential from IV-E collections cited in the report is overly optimistic [because] [i]t does not seem to take into account the cost of providing Child Support Enforcement services."¹⁴³ The OIG acknowledged the oversight, but then, unable to accurately determine the administrative costs, simply guessed: "We are unable to calculate the marginal change in administrative costs that might be attributable to additional collections. However, to roughly estimate possible Federal savings, we arbitrarily reduced the net Federal share of collections by fifty percent."¹⁴⁴ The report then concluded that if the percentage of children receiving child support enforcement services had increased to half of all IV-E foster care cases in 1990, the resulting collections would have reached \$74 million.¹⁴⁵ The federal share of the collections would have been \$22.6 million, and thus \$11.3 million in estimated federal savings (using the arbitrary fifty percent administrative cost reduction).¹⁴⁶

Unfortunately, the guess is still a guess. Despite the promising prognosis, the OIG has not reviewed the cost effectiveness again, and the necessary data to adequately compare collections with costs is still not available. Total child support collections in foster care cases are known,¹⁴⁷ but the relevant administrative costs are not. The costs are only tracked for the total child support caseload rather than broken down

¹⁴¹ 1992 OIG REPORT, *supra* note 2, at ii.

¹⁴² *Id.* The report's finding indicated that only 11.6% of the sampled children in foster care were included in a child support order and that few foster care agencies had effective practices for referring cases to the IV-D child support program. *Id.* at 5, 7-8.

¹⁴³ *Id.* at app. E.

¹⁴⁴ *Id.* at 16, app. D-2.

¹⁴⁵ *Id.* at app. D-1.

¹⁴⁶ *Id.* at app. D-2.

¹⁴⁷ See OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., FY 2004 ANNUAL REPORT TO CONGRESS, tbl. 9 (Apr. 2007) [hereinafter FY 2004 ANNUAL REPORT], available at http://www.acf.hhs.gov/programs/cse/pubs/2007/reports/annual_report/table_9.html.

by type of case.¹⁴⁸ Thus, with the data currently available, comparing child support collections in foster care cases with the portion of administrative costs applicable to those collections is not possible.¹⁴⁹

Of the numbers that are available, the picture does not look overly promising. Certainly, the enforcement efforts and resulting collections have grown. Total distributed foster care collections reached \$90 million in 2004,¹⁵⁰ 22% greater than the \$74 million that the OIG estimated would have led to \$11.3 million in federal savings in 1990.¹⁵¹ However, the total administrative costs grew at a much faster rate: over 330% during the same time period, from \$1.6 billion in 1990 to \$5.3 billion in 2004.¹⁵² Again, the portion of increased administrative costs relevant to foster care cases is unknown, but as the administrative costs continue to increase, the cost benefit of child support collections in foster care cases is further in doubt.¹⁵³

In contrast to cost recovery collections, the collection efforts have been a great success in those cases where child support is owed to children rather than to the government. Almost \$22 billion in child support collections were distributed directly to children and their families in 2006, a return on investment of over 400%.¹⁵⁴

Therefore, the conclusion is clear. When child support benefits children, the collection effort is well worth the cost. When child support is routed toward cost recovery, the questionable fiscal benefit to the government is simply not worth the harm that results. Further, in addition

¹⁴⁸ See Hatcher, *Child Support*, *supra* note 11, at 1073.

¹⁴⁹ Further, the number of foster care cases in the total child support caseload is also not known. The Federal Office of Child Support Enforcement only requires states to provide the number of "current assistance" cases, combining both IV-E and TANF cases without the numbers broken down by type of assistance. See E-Mail from Kenneth Dittmar, Office of Child Support Enforcement, U.S. Dep't of Health & Human Servs. (Aug. 15, 2007, 12:39 EST) (on file with author) (confirming that the federal child support agency does not have data available regarding the number of foster care cases in the child support caseload). Were the number of foster care cases in the child support caseload available, an estimation of relevant administrative costs would be possible. See Hatcher, *Child Support*, *supra* note 11, at 1070-74 (providing the analysis of how to estimate administrative costs in welfare cost recovery cases where the number of cases with current or former welfare assistance is provided).

¹⁵⁰ FY 2004 ANNUAL REPORT, *supra* note 147.

¹⁵¹ 1992 OIG REPORT, *supra* note 2, at app. D.

¹⁵² FY 2004 ANNUAL REPORT, *supra* note 147, at tbl.1; STAFF OF H. COMM. ON WAYS & MEANS, 108TH CONG., 2004 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON THE PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS tbl. 8-1 (Comm. Print 2004), available at <http://www.gpoaccess.gov/wmprints/green/2004.html> (listing 1990 administrative costs for the child support program).

¹⁵³ As a further comparison, an examination of the cost efficiency in cost recovery collections in all current assistance cases (both TANF and foster care cases combined) reveals that the effort results little if any fiscal benefit to the government. Hatcher, *Child Support*, *supra* note 11, at 1070-74.

¹⁵⁴ *Id.* at 1070; OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD SUPPORT ENFORCEMENT, FY 2006 PRELIMINARY REPORT tbl.1 (2007), available at http://www.acf.hhs.gov/programs/cse/pubs/2007/preliminary_report/table_1.html (listing total collections not retained by the government at almost \$22 billion, and total administrative costs at \$5.56 billion).

to the negative policy implications of the cost recovery effort, the next part of the Article analyzes the significant legal concerns that also result.

III. LEGAL CROSSROADS

The forced intersection of foster care and child support causes the agencies to straddle competing goals: serving the interests of children and parents while simultaneously pursuing assigned child support that harms the children and parents. In addition to the negative policy effects and questionable fiscal soundness discussed above, several legal concerns emerge at the crossroads.

A. *Illegal Diversion*

The first legal problem stems from the diversion of the child welfare system's primary purposes towards the cost recovery pursuit. Family reunification continues to be a core agency mission,¹⁵⁵ but enforcing government-owed child support obligations against the parents of foster children undermines the reunification goal. The diversion is not only bad policy; it's contrary to federal law.

Unless a specific exception applies, child welfare agencies are federally required to make "reasonable efforts" in order "to preserve and reunify families."¹⁵⁶ The reunification services must be incorporated into a case plan, including a description of the services to be provided, in order to help improve the parents' circumstances so that a safe reunification may be possible.¹⁵⁷ Further, states must establish a "case review system" to regularly review the appropriateness of the plan and progress toward meeting the plan's goals.¹⁵⁸

Reunification services and case planning requirements are aimed at ensuring that parents receive needed assistance to help address the problems that led to child removal.¹⁵⁹ The services and plans are supposed to help make reunification more likely, not add burdens irrelevant to the children's interests or that do not address the causes for child removal.¹⁶⁰ However, foster care cost recovery through child support enforcement imposes precisely such an irrelevant barrier. The

¹⁵⁵ See *supra* Part II.A.

¹⁵⁶ 42 U.S.C. § 671(a)(15) (2000).

¹⁵⁷ *Id.* § 675(1)(B); 45 C.F.R. §§ 1356.21(b), 1356.21(g)(4) (2007).

¹⁵⁸ 42 U.S.C. §§ 671(a)(16), 675(5).

¹⁵⁹ *Id.* § 675(5)(B) (requiring case reviews to consider "the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care"); Kathleen S. Bean, *Reasonable Efforts: What State Courts Think*, 36 U. TOL. L. REV. 321, 345 (2005).

¹⁶⁰ Bean, *supra* note 159, at 345 ("In order for the plan to be reasonable, it must have been created to fix the problems that required state involvement. The case plan must not 'consist of 'a litany of required services that [are] not related to the conditions that eventually gave rise to the dependency adjudication.'") (quoting *In re Child of E.V.*, 634 N.W.2d 443, 447 (Minn. Ct. App. 2001))) (footnotes omitted) (alteration in original).

government-owed debt does not serve the children's interests, is unrelated to circumstances that lead to removal, and the additional obligation will harm an already impoverished parent's reunification efforts. Although not specifically addressing the issue of government-owed child support, a Minnesota court describes the concern:

At a minimum, "reasonable efforts" requires the responsible agency to provide those services that would assist in alleviating the conditions leading to the determination of dependency. In this case, the welfare department did not provide any supportive services that would alleviate the financial stresses that existed in the home. Instead, the foster placement plan imposes additional financial obligations on the parent.¹⁶¹

In fact, the federal law establishing the cost recovery requirements also recognizes the potential conflict with case-planning goals. States are required to "secure an assignment" of child support rights in foster care cases only "where appropriate,"¹⁶² meaning only when not contrary to the best interests of the child or in conflict with reunification efforts.¹⁶³ Thus, a harmonious implementation of the otherwise conflicting federal requirements is suggested. However, as explained in Part I.B.3, many states ignore the available discretion and refer foster care cases for child support enforcement regardless of the negative effect.¹⁶⁴

Even worse, not only do states often blindly initiate the cost recovery process without consideration of the conflict with reunification goals, many states include the payment of government-owed child support as a required element in the reunification plans.¹⁶⁵ If the debt is not paid, the children are not returned. Although the case plans are

¹⁶¹ *In re Welfare of M.A.*, 408 N.W.2d 227, 235-36 (Minn. App. 1987) (citation omitted).

¹⁶² 42 U.S.C. § 671(a)(17).

¹⁶³ U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, CHILD WELFARE POLICY MANUAL, 8.4C TITLE IV-E, GENERAL TITLE IV-E REQUIREMENTS, CHILD SUPPORT, available at http://www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?ciltID=170.

¹⁶⁴ See *supra* note 83 and accompanying text.

¹⁶⁵ See, e.g., *Beverlin v. Arkansas Dep't of Health & Human Servs.*, No. CA 07-313, 2007 WL 3088278, at *1 (Ark. Ct. App. Oct 24, 2007) (discussing "appellants' failure to comply with other portions of the case plan, e.g., their failure to pay court-ordered child support and their failure to maintain stable employment and stable living arrangements"); *W.N. v. Dep't of Children & Family Servs.*, 919 So. 2d 589, 590 (Fla. Dist. Ct. App. 2006) ("Both parents entered into a reunification case plan which required W.N., among other things, to participate in a substance abuse program, attend parenting classes, pay child support and remain drug free."); *In re K.S.*, 658 S.E.2d 403, 407 (Ga. Ct. App. 2008) ("The mother failed to comply with her case plans, especially the requirements to maintain a drug-free home, maintain stable income, pay child support . . ."); *State ex rel. S.C.M.*, 986 So. 2d 875, 879 (La. Ct. App. 2008) ("[T]he case plan required B.E.M. to: . . . (7) financially support her children by paying child support as ordered; (8) attend domestic violence counseling; (9) maintain a stable, safe home and maintain all utilities . . ."); *In re D.M.*, 615 S.E.2d 669, 672 (N.C. Ct. App. 2005) ("Respondent's case plan objectives included: (1) complete the NOVA program; (2) attend visits with D.M.; (3) pay child support . . ."), *aff'd*, 622 S.E.2d 494 (N.C. 2005); *In re A.D.*, 151 P.3d 1102, 1106 (Wyo. 2007) ("The case plan also required that Mother support her children by maintaining full-time employment, providing health insurance and paying child support.").

intended to serve as collaborative road maps to help guide the parents towards reunification, the plans are converted into debt-collection tools with the children held out as leverage.

When states fail to consider the impact of the cost recovery debt on reunification efforts, or when the debt is added as an additional obligation into the reunification plans, the federal laws requiring reunification services are violated. Unfortunately, the Supreme Court in *Suter v. Artist M.* held that the requirement in 42 U.S.C. § 671(a)(15) to provide “reasonable efforts . . . to make it possible for the child to return to his home” is not enforceable in a 42 U.S.C. § 1983 claim.¹⁶⁶ However, other options remain viable. The violation can be challenged at several points in the child dependency process, including the initial judicial determination establishing the child support obligation,¹⁶⁷ during the required six-month review hearings or the annual permanency hearings,¹⁶⁸ and by separate motion to reconsider or modify an already existing order.¹⁶⁹ Relief may also be available under a state administrative procedures act¹⁷⁰ or by writ of mandamus.¹⁷¹ Further, although the *Suter* decision banned § 1983 claims to enforce the reasonable efforts requirement in 42 U.S.C. 671(a)(15), private causes of action to enforce other statutory provisions may be possible.¹⁷²

¹⁶⁶ *Suter v. Artist M.*, 503 U.S. 347, 358-63 (1992).

¹⁶⁷ States vary in the procedure of setting the initial child support order. For example, the order might be established in the same juvenile court proceedings determining dependency, in a separate child support hearing with separate case number, or an administrative proceeding.

¹⁶⁸ 42 U.S.C. § 675(5) (2000).

¹⁶⁹ Such a motion might seek a juvenile court to reconsider the establishment of a child support obligation under the discretion provided in 42 U.S.C. § 671(a)(15), or seek modification of a child support order under state statutory discretion to deviate downward from the guidelines’ recommended amount. *See, e.g., In re Joshua W.*, 617 A.2d 1154, 1163 (Md. Ct. Spec. App. 1993) (“[A] downward departure from the guidelines could be justified as in the best interests of a child in foster care if the court found, in the proper case, that such an adjustment was necessary for the parent to obtain the economic stability necessary to regain custody and care properly for the child.”).

¹⁷⁰ *E.g.*, MD. CODE ANN., STATE GOV’T § 10-222 (West 2009) (provision of the Maryland Administrative Procedures Act explaining that “a party who is aggrieved by the final decision in a contested case is entitled to judicial review of the decision as provided in this section”).

¹⁷¹ *E.g.*, MD. R. CIR. CT. R. 7-401 (2008) (providing the procedures for seeking a writ of administrative mandamus, described as “actions for judicial review of a quasi-judicial order or action of an administrative agency where review is not expressly authorized by law”). *See generally* Sam Walker, *Judicially Created Uncertainty: The Past, Present, and Future of California Writ of Administrative Mandamus*, 24 U.C. DAVIS L. REV. 783 (1991) (explaining history of administrative mandamus in California).

¹⁷² *See* Sara J. Klein, Note, *Protecting the Rights of Foster Children: Suing Under § 1983 to Enforce Federal Child Welfare Law*, 26 CARDOZO L. REV. 2611, 2629-30 (2005) (describing the congressional “*Suter* fix,” wherein Congress attempted to ensure that other child welfare provisions of the Social Security Act might be enforceable); Sankaran, *supra* note 94, at 311 n.133 (“Although the Supreme Court held, in *Suter v. Artist M.*, 503 U.S. 347 (1992), that the ‘reasonable efforts’ provisions in the Adoption Assistance and Child Welfare Act did not create a private cause of action, lower courts, subsequent to that decision, have found other provisions of the AACWA to be enforceable through litigation.” (citation omitted)); Everett Skillman, *The Adoption Assistance and Child Welfare Act and the Minor’s Civil Rights Remedies*, 14 TRINITY L. REV. 1, 13-14 & n.44 (2007) (noting that despite *Suter*, courts have held that other provisions in the AACWA (including reunification services and case planning requirements) are enforceable under § 1983) (citing *Kenny A. ex rel. Winn v. Perdue*, 218 F.R.D. 277, 292 (N.D. Ga. 2003); *Brian A. ex rel. Brooks v.*

Time is of the essence in the advocacy strategy chosen. For as the next section explains, the end of the parent-child relationship may be fast approaching if the conflict with reunification goals is not remedied.

B. Constitutional Implications: Terminating Parental Rights for a Government-Owed Debt

“We have not rid ourselves of debtors prisons only to substitute for that Dickensian horror, the termination of the debtor’s parental rights.”¹⁷³

Many states include the failure to pay child support as a factor in the statutory grounds for terminating parental rights, sometimes allowing that factor alone to warrant termination.¹⁷⁴ The subordination of the parent-child relationship to the government’s fiscal interests is unconstitutional.

A parent’s purposeful refusal to support a child might initially seem relevant to whether a termination of parental rights is in the child’s interests. However, child support for a foster child is owed to the government,¹⁷⁵ and the relevant government interest in termination of parental rights proceedings is protecting the welfare of children—not collecting a government-owed debt.¹⁷⁶ An analogous scenario can provide a comparison: If a parent takes out a government loan to help pay the costs of a child’s education and then defaults on the loan, should the default result in termination of the parent-child relationship?¹⁷⁷ Clearly, a child in foster care presents a far different context from that of a student loan. In an involuntary foster care placement, the child is removed from the family home because of parental abuse or neglect and the government is forced to expend resources to care for the child. However, although the initial circumstances leading up to the financial obligations differ, the parental debt is the same: obligations owed to the government, not to the child.

Application of the debt obligation as grounds for terminating parental rights presents a disturbing injection of agency cost recovery efforts into the child welfare mission, with the children treated as leverage. If parents keep up with the payments in order to reimburse

Sundquist, 149 F. Supp. 2d 941, 949 (M.D. Tenn. 2000); Marisol A. *ex rel.* Forbes v. Giuliani, 929 F. Supp. 662, 683 (S.D.N.Y. 1996), *aff’d*, 126 F.3d 372 (2d Cir. 1997); Jeanine B. *ex rel.* Blondis v. Thompson, 877 F. Supp. 1268, 1283-85 (E.D. Wis. 1995)).

¹⁷³ *In re Adoption of J.W.M.*, 532 N.W.2d 372, 380 (N.D. 1995) (Levine, J., dissenting) (discussing reliance on unpaid child support as grounds for termination of parental rights in petition for adoption), *overruled by In re Adoption of S.R.F.*, 683 N.W.2d 913 (N.D. 2004).

¹⁷⁴ See *supra* note 22.

¹⁷⁵ 42 USC § 671(a)(17) (2000).

¹⁷⁶ See *supra* Part II.A (describing the purpose of the child welfare system).

¹⁷⁷ Although government student loans are often obtained in the names of the students, parents can also take student loans for their children. See U.S. Dep’t of Educ., Office of Fed. Student Aid, PLUS Loans (Parent Loans), <http://studentaid.ed.gov/PORTALSWebApp/students/english/parentloans.jsp> (last visited Mar. 13, 2009).

foster care costs, they may have a chance of reunification with their children. Failure to pay the debt may be a factor causing the child-collateral to be lost.

Several state courts have allowed such terminations based upon child support obligations to proceed.¹⁷⁸ For example, in the case briefly discussed in the Introduction, the Court of Appeals of North Carolina upheld the termination of parental rights of an incarcerated father solely because the father's failure to pay child support to reimburse state costs.¹⁷⁹ The child had done well in her father's care prior to his incarceration, and the child welfare agency agreed to plans for reunification after prison release.¹⁸⁰ But, as if guided by a split personality of competing purposes, the agency simultaneously sought to terminate the father's parental rights.¹⁸¹ The relevant statutory provision allowing termination of parental rights for government-owed child support explains:

(a) The court may terminate the parental rights upon a finding of one or more of the following:

...

(3) The juvenile has been placed in the custody of a county department of social services . . . and the parent, for a continuous period of six months next preceding the filing of the petition or motion, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.¹⁸²

Although the father made only pennies a day through work in the prison kitchen, and he was under no court order to pay child support, the court found "there was clear and convincing evidence that [the father] had an ability to pay an amount greater than zero."¹⁸³ The opinion includes no discussion of why the termination was in the child's best interests other than to state that because a statutory ground for termination existed (failure to pay child support), the trial court was correct in concluding the child's interests were served.¹⁸⁴ Whereas the majority opinion includes

¹⁷⁸ However, not all courts have indicated termination of parental rights is appropriate based upon the failure to pay child support where there is insufficient evidence of the parent's ability to pay. *E.g.*, *In re T.H.*, 979 So. 2d 1075, 1081 (Fla. Dist. Ct. App. 2008) ("In the absence of some evidence that the Father was able to provide financial support for T.D.H. while incarcerated and that he failed to do so, termination of this Father's parental rights on this basis is improper.").

¹⁷⁹ See generally *In re T.D.P.*, 595 S.E.2d 735 (N.C. Ct. App. 2004), *aff'd*, 610 S.E.2d 1999 (N.C. 2005) (per curiam).

¹⁸⁰ See *id.* at 740, 742 (Wynn, J., dissenting).

¹⁸¹ See *id.* at 739, 742.

¹⁸² N.C. GEN. STAT. ANN. § 7B-1111(a)(3) (West Supp. 2008).

¹⁸³ *In re T.D.P.*, 595 S.E.2d at 738 (majority opinion).

¹⁸⁴ *Id.* ("[B]ecause we conclude that the trial court properly determined that grounds for termination existed under N.C. Gen.Stat. § 7B-1111(a)(3), we also hold that the trial court did not abuse its discretion in finding that it was in T.D.P.'s best interest to terminate respondent's parental rights.").

few facts to understand the story behind the ruling, the dissenting opinion fills in some details regarding the incarcerated father's circumstances:

Since his parents were deceased and he did not have any siblings, he contacted his aunt who reared him to see if she could care for his daughter; but, she was unable to do so. As he did not have any other relatives whom he could recommend as potential caretakers of T.D.P., his daughter remained in foster care.

. . . He sent letters to his daughter's social worker to inquire about her well-being and development. . . . Then, at Christmas, T.D.P.'s father arranged to have a Christmas gift sent to his daughter through the Angel Tree organization. . . .

While incarcerated T.D.P.'s father called the social worker as often as possible to inquire about his daughter.

. . . .

. . . .

. . . During his service in the U.S. Army from 1978-1983, from which he received two honorable discharges, T.D.P.'s father earned his GED. . . . Prior to his incarceration, he worked as a restaurant cook and the restaurant manager told him she would rehire him upon his release.

. . . .

. . . [W]hile T.D.P. was in her father's care, DSS concluded the minor child was happy, healthy, clothed and well-fed. . . . Due to his good behavior, his release date had been changed to an earlier date, December 2003.¹⁸⁵

A DSS-approved plan was in place for the child to be reunified with her father in January 2004 after his release from prison.¹⁸⁶ But the race to terminate parental rights, fueled by focus on cost recovery, trumped the reunification plan.

Other than explaining that the father could have paid "an amount greater than zero,"¹⁸⁷ no indication was provided by the majority opinion as to how much in child support payments would have been sufficient to cover a "reasonable portion of the cost of care" and thus prevent the termination.¹⁸⁸ The dissenting opinion recognized that at forty cents a day, the father earned only \$2.80 per week during the relevant time period.¹⁸⁹ Thus, considering his total earnings and the maximum amount of support he could have paid during the six-month statutory period, the

¹⁸⁵ *Id.* at 739-40 (Wynn, J., dissenting).

¹⁸⁶ *Id.* at 742.

¹⁸⁷ *Id.* at 738 (majority opinion).

¹⁸⁸ *See id.* at 737 (quoting the trial court's decision) (internal quotation marks omitted).

¹⁸⁹ Although the majority opinion initially explains that the father's income ranged between forty cents and one dollar per day while he was incarcerated, *see id.* at 737, the dissenting opinion seems to indicate that the relevant income during the statutory period was limited to forty cents per day, or \$2.80 per week, *see id.* at 740 (Wynn, J., dissenting).

father's parental rights were terminated for a government debt of \$72.80.¹⁹⁰

Next, a 2007 Georgia case provides an example where unpaid child support is not the sole grounds for terminating parental rights, but a significant factor.¹⁹¹ A seventeen-year old girl had a child while in foster care, and the mother and daughter were separated because the child welfare agency placed the mother in a foster home that would not take the baby.¹⁹² Although the separation did not occur due to any allegations of maltreatment, the agency required that the mother—while still in foster care herself—to pay child support as part of her reunification plan.¹⁹³ The plan imposed multiple obligations upon the troubled teenaged mother, including that she complete her education while simultaneously finding employment in order to pay child support to reimburse costs of her daughter's care.¹⁹⁴ Then, just six months after the mother aged out of foster care at eighteen and was engaged in a struggle for economic stability, the child welfare agency filed a petition to terminate her parental rights.¹⁹⁵ The trial court concluded:

[T]here is no doubt that this mother loves this child. However, her own circumstances have placed her in the position of not being able to provide the basic necessities for the child since the child's birth one and one-half years ago.¹⁹⁶

In addition to the presence of a possible adoptive resource for the child, the Court of Appeals of Georgia looked to several factors as grounds for upholding the termination, circumstances that often confront foster children as they attempt to transition to independence.¹⁹⁷ The mother had not completed her GED and was unable to "maintain stable housing and employment."¹⁹⁸ She continued to suffer from mental illnesses including post traumatic stress disorder, ADHD, and borderline personality disorder, which were likely exacerbated by abuse and neglect before she was placed in foster care at age 15.¹⁹⁹ The court noted that because the

¹⁹⁰ Using the dissent's explanation that the father earned forty cents per day, the maximum amount the father could have earned during the six-month statutory period was \$72.80. *See id.* at 740.

¹⁹¹ *See generally In re D.L.T.*, 641 S.E.2d 236 (Ga. Ct. App. 2007).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 238 (internal quotation marks omitted) (quoting the trial court's decision).

¹⁹⁷ *See, e.g.,* Austen L. Parrish, *Avoiding the Mistakes of Terrell R.: The Undoing of the California Tort Claims Act and the Move to Absolute Governmental Immunity in Foster Care Placement and Supervision*, 15 STAN. L. & POL'Y REV. 267, 278 (2004) ("[A]fter leaving foster care, 27% of males were incarcerated within twelve to eighteen months, 50% were unemployed, 37% did not graduate from high school, 33% were on public assistance, 47% were receiving counseling or medication for medical problems just before leaving the system, and 33% were diagnosed with three or more psychiatric problems." (footnotes omitted)).

¹⁹⁸ *In re D.L.T.*, 641 S.E.2d at 239.

¹⁹⁹ *Id.* at 237-38.

mother would no longer receive Medicaid coverage after she aged out of foster care, she would be unable to afford medications needed to treat her mental illness.²⁰⁰ And, in addition to her unfortunate status as a former foster child struggling to make it on her own, the court placed emphasis on the fact that the mother was \$220 in arrears in her child support obligation owed to the government.²⁰¹

The examples are not isolated occurrences. In another North Carolina case, the court upheld a termination of parental rights for unpaid child support where the parent paid \$136 of \$300 owed.²⁰² South Carolina courts have repeatedly held that incarcerated parents' parental rights can be terminated on the sole ground of failing to pay government-owed child support.²⁰³ In Georgia, court decisions regarding the termination of parental rights of a disabled father and an incarcerated mother echoed a description that the state's "law requires a parent to financially support his or her child while the child is in foster care, even in the absence of a court order"²⁰⁴ and "even if personally disabled"²⁰⁵ or "unable to earn income."²⁰⁶ And in New York, unwed fathers can even lose the right to be heard through contested termination of parental rights proceedings: the statutory framework in New York not only considers child support as a significant factor, but if unwed fathers cannot prove that they have paid sufficient child support for their children in foster care, then the fathers are denied the right to object to potential adoptions or to have their rights considered in termination of parental rights hearings.²⁰⁷

²⁰⁰ See *id.* at 238-39.

²⁰¹ See *id.* at 238.

²⁰² *In re E.F.C.K.*, 623 S.E.2d 368 (N.C. Ct. App. 2006) (unpublished table decision); see also *In re C.W.*, 628 S.E.2d 259 (N.C. Ct. App. 2006) (unpublished table decision) ("[R]espondent had a duty to defray the costs of care of the children, who were in the custody of DSS for six months prior to the filing of the motion to terminate parental rights. . . . The trial court did not err by finding and concluding that a ground existed to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(3).").

²⁰³ *E.g.*, *S.C. Dep't of Soc. Servs. v. Parker*, 519 S.E.2d 351 (S.C. Ct. App. 1999); *S.C. Dep't of Soc. Servs. v. Phillips*, 391 S.E.2d 584 (S.C. Ct. App. 1990).

²⁰⁴ *E.g.*, *In re A.R.A.S.*, 629 S.E.2d 822, 827 (Ga. Ct. App. 2006); *In re C.M.*, 621 S.E.2d 815, 816 (Ga. Ct. App. 2005) (examples of multiple cases using the same phrase).

²⁰⁵ *In re C.M.*, 275 Ga. App. at 721.

²⁰⁶ *In re A.R.A.S.*, 278 Ga. App. at 613.

²⁰⁷ In New York, a statute establishes a presumption that an unwed father does not have the right to object to an adoption proceeding unless he proves certain factors demonstrating a substantial relationship with the child. N.Y. DOM. REL. LAW § 111(1)(d) (McKinney 2009). The first required element the father must prove is "the payment by the father toward the support of the child." *Id.* § 111(1)(d)(i). Even if the father can prove the other statutory factors of regular visitation or communications, a father who has been unable to provide financial support may not be able to overcome the presumption against his right to object. The statutory requirement was held to be unconstitutional as applied to the specific facts of one case. See *In re M./B. Children*, 792 N.Y.S.2d 785, 794 (N.Y. Fam. Ct. 2004). However, in other cases where child support is the sole issue, the provisions continue to be upheld. See, e.g., *In re Latricia M.*, 867 N.Y.S.2d 402, 402 (N.Y. App. Div. 2008) (denying an unwed father's motion to be deemed a "consent father" with the right to object to adoption for the sole reason of not proving the payment of sufficient child support).

The loss of parental rights may very well have been in the best interests of the children in the example cases discussed above. However, much is not known regarding the full circumstances, and the courts' diverted attention is the problem. The focus on debt collection is a departure from the core concerns considered in termination of parental rights proceedings, parental fitness and the welfare of the children, giving rise to constitutional concerns.

1. Substantive Due Process

The Supreme Court has not waived in its recognition of the importance of the parent-child relationship. As Justice Ginsberg explained, the Court has been "unanimously of the view that 'the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment'" and "that '[f]ew consequences of judicial action are so grave as the severance of natural family ties.'"²⁰⁸ While consistently recognizing the relationship as constitutionally protected, the Court has struggled with the level of constitutional protections afforded.

In 1972, the Court in *Stanley v. Illinois* struck down as unconstitutional a state statute that considered unmarried fathers to be presumptively unsuitable parents.²⁰⁹ The Court explained that children must not be removed in dependency proceedings without a hearing on parental unfitness considering individualized proof.²¹⁰ Nine years later, in *Lassiter v. Dep't of Social Services of Durham County, North Carolina*, the Court limited the constitutional protections necessary.²¹¹ Although still recognizing the constitutionally protected status of the parent-child relationship, the Court concluded that due process did not always require that an indigent parent be appointed counsel in a termination of parental rights proceeding.²¹² Justice Blackmun's dissent notes the Court's inconsistency:

The determination of whether the father can overcome the presumption against his right to object is significant, because if he is not deemed a "consent father," his parental rights can be effectively terminated without actually proceeding through the more detailed requirements and protections under section 384 of the Social Services Law (New York's termination of parental rights statute). If the father is able to establish his right to object, the adequacy of the payment of child support obligations may still be a considered but is not listed as a sole factor allowing termination under the termination of parental rights statute. *E.g., In re Isaiah F.*, 871 N.Y.S.2d 387 (N.Y. App. Div. 2008), *leave to appeal denied*, 902 N.E.2d 439 (N.Y. 2009).

²⁰⁸ *M.L.B. v. S.L.J.*, 519 U.S. 102, 119 (1996) (quoting *Santosky v. Kramer*, 455 U.S. 745, 774, 787 (1982) (Rehnquist, J., dissenting)).

²⁰⁹ *Stanley v. Illinois*, 405 U.S. 645 (1972).

²¹⁰ *Id.*

²¹¹ *Lassiter v. Dep't of Soc. Servs. of Durham County*, 452 U.S. 18 (1981).

²¹² *Id.*

Finally, I deem it not a little ironic that the Court on this very day grants, on due process grounds, an indigent putative father's claim for state-paid blood grouping tests in the interest of according him a meaningful opportunity to disprove his paternity, [citing *Little v. Streater*], but in the present case rejects, on due process grounds, an indigent mother's claim for state-paid legal assistance when the State seeks to take her own child away from her in a termination proceeding.²¹³

The very next year in 1982, Justice Blackmun wrote the majority opinion in *Santosky v. Kramer*, holding that before a state may terminate parental rights, the state must prove its allegations by at least clear and convincing evidence.²¹⁴ The pendulum continued to swing, and the year after *Santosky* was decided the Court concluded in *Lehr v. Robertson* that the failure to provide notice to a putative father of pending adoption proceedings did not deny him due process.²¹⁵ Then, in 1996, the Court held in *M.L.B. v. S.L.J.* that a state statute requiring an indigent mother to pay transcript costs in order to appeal a termination of parental rights determination violated the equal protection and due process clauses of the Fourteenth Amendment.²¹⁶

Where the termination of parental rights for government-owed child support may fall under the Supreme Court's pendulum has not been considered, but such consideration is due. The example statute in North Carolina allows for the termination of parental rights based upon any one of several grounds, including if "the parent, for a continuous period of six months . . . has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so."²¹⁷ The statute requires that the evidence of such grounds be proved by clear and convincing evidence,²¹⁸ as required by the Supreme Court in *Santosky*.²¹⁹ However, the presence of clear and convincing evidence of state grounds for terminating parental rights does not end the analysis because constitutional protections also demand inquiry into the content of the grounds to be proved.²²⁰

Although the Supreme Court in *Stanley* seemingly laid out a constitutional requirement for a parental unfitness determination prior to terminating parental rights,²²¹ lower courts continue to disagree. Several

²¹³ *Id.* at 58.

²¹⁴ *Santosky v. Kramer*, 455 U.S. 745 (1982).

²¹⁵ *Lehr v. Robertson*, 463 U.S. 248 (1983).

²¹⁶ *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

²¹⁷ N.C. GEN. STAT. ANN. § 7B-1111(a)(3) (2009).

²¹⁸ *Id.*

²¹⁹ *Santosky*, 455 U.S. at 746.

²²⁰ *See Troxel v. Granville*, 530 U.S. 57, 65 (2000) (noting that the Due Process Clause of the Fourteenth Amendment guarantees not only fair process, but also has a substantive component); *M.L.B.*, 519 U.S. at 119 (noting that the parent-child relationship is a fundamental right protected by the Fourteenth Amendment).

²²¹ *Stanley v. Illinois*, 405 U.S. 645, 649 (1972); *see also* MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 63-65 (2005) (concluding the *Stanley* decision established a constitutional requirement to determine parental unfitness prior to termination of parental rights).

state court decisions support the conclusion that parental unfitness is a requisite finding,²²² while some courts have refused to require such a determination.²²³ The disagreement in the courts echoes a tension between children's rights, parents' rights, and the interests of the state, and the tension is unlikely to be resolved.²²⁴ This is the very nature of the laws regarding children, which require the exercise of discretion to weigh and balance various interests and concerns, and which are sometimes aligned and sometimes competing, depending on the individualized circumstances of the case. But whether the requisite standard for terminating parental rights is parental unfitness, the best interests of children, or some blended variation of the two, all should agree that the Supreme Court has recognized a fundamental liberty interest in the parent-child relationship that requires meaningful inquiry into the substantive content of state statutes providing for the permanent severing of the relationship.²²⁵

The point is simple: substantive due process, by definition, is about more than process.²²⁶ As the Supreme Court explained in *Troxel v. Granville*:

The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process." . . . The Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests."²²⁷

²²² See, e.g., *In re Guardianship of Ann S.*, 41 Cal. Rptr. 3d 709, 719 (2006) (explaining that the "state cannot terminate a parental relationship based solely upon the best interests" of the child without some showing of parental unfitness" (quoting *In re Heather B.*, 11 Cal. Rptr. 2d 891, 904 (Cal. Ct. App. 1992))) (footnote omitted), *petition for review granted and opinion superseded sub nom. In re Ann Marie S.*, 141 P.3d 133 (Cal. 2006), *aff'd sub nom. In re Guardianship of Ann S.*, 202 P.3d 1989 (Cal. 2009); *In re Termination of Parental Rights to Max G.W.*, 716 N.W.2d 845, 857 (Wis. 2006) (explaining that "[t]he United States Supreme Court has recognized a parent's fundamental right to the care and custody of his or her child, and concluded that a state may not terminate this right without an individualized determination that the parent is unfit").

²²³ See, e.g., *Matter of Adoption of J.W.M.*, 532 N.W.2d 372, 378 (N.D. 1995), *overruled on other grounds by In re Adoption of S.R.F.*, 683 N.W.2d 913 (N.D. 2004) (In supporting its holding that due process does not require that parental rights can only be terminated on the ground of parental unfitness, the court explained that Santosky requires clear and convincing evidence but does not dictate the content of grounds to be proven.).

²²⁴ E.g., Woodhouse, *supra* note 93, at 422 (noting "our inability to strike a proper balance between a triad of conflicting rights and interests—those of parents, children and the state").

²²⁵ See *infra* notes 226-227 and accompanying text.

²²⁶ Black's Law Dictionary defines substantive due process as focusing on fair content rather than fair procedures: "The doctrine that the Due Process Clauses of the 5th and 14th Amendments require legislation to be fair and reasonable in content and to further a legitimate governmental objective." BLACK'S LAW DICTIONARY 539 (8th ed. 2004); see, e.g., *In re Detention of Willis*, 691 N.W.2d 726, 729 (Iowa 2005) ("Under principles of substantive due process, the State is prohibited from engaging in arbitrary or wrongful actions regardless of the fairness of the procedures used to implement them.").

²²⁷ *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

Rather than the mere rational basis scrutiny requiring government statutes and regulations to be rationally related to legitimate government interests,²²⁸ substantive due process protections for fundamental rights requires more. Justice Scalia described the heightened scrutiny as “a substantive component, which forbids the government to infringe certain ‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”²²⁹

A statute that allows the termination of parental rights due to a child support obligation owed to the government fails the test. The state interest in termination of parental rights proceedings is clear and compelling: protecting the welfare of children.²³⁰ However, terminating the parent-child relationship because of a government-owed debt is not related to the compelling state interest, let alone narrowly tailored. The statutory provision in North Carolina has been construed as allowing the termination of parental rights for less than \$100 owed to the government.²³¹ Even if the unpaid amount were much greater, severing the parent-child relationship as result of the government’s self-interested cost recovery collections is simply not narrowly tailored to serve the state interest in protecting the welfare and best interests of the individual child.²³² Thus, with the required nexus lacking, such a statute should not withstand substantive due process scrutiny.

2. Cruel and Unusual Punishment

In addition to the substantive due process violations, an impoverished parent’s loss of a child resulting from the inability to pay a government debt raises another consideration—cruelty. The Eighth Amendment to the Constitution, in addition to forbidding excessive bail

²²⁸ *Kadmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 457-58 (1988) (“Unless a statute provokes ‘strict judicial scrutiny’ because it interferes with a ‘fundamental right’ or discriminates against a ‘suspect class,’ it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose.”).

²²⁹ *Reno v. Flores*, 507 U.S. 292, 301-02 (1993).

²³⁰ *See, e.g., In re L.L.*, 159 P.3d 499, 501 (Wyo. 2007) (describing the tension in termination of parental rights proceedings “between the fundamental liberty of familial association and the compelling state interest in protecting the welfare of children”) (quotation omitted).

²³¹ *In re T.D.P.*, 595 S.E.2d 735, 738 (N.C. Ct. App. 2004), *aff’d*, 610 S.E.2d 199 (N.C. 2005) (per curiam).

²³² In 2006, the Supreme Court of Wisconsin reached a similar conclusion regarding the application of a termination of parental rights statute to an incarcerated mother. *See In re Termination of Parental Rights to Max G.W.*, 716 N.W.2d 845, 848, 861 (Wis. 2006) (“We also conclude that the circuit court’s finding of parental unfitness was based on an impossible condition of return, without consideration of any other relevant facts and circumstances particular to the parent . . . contrary to . . . Wis. Stat. § 48.415(2)(a) We further determine that 48.415(2), as applied to Jodie, is not narrowly tailored to advance a compelling state interest, and therefore conclude that Jodie’s constitutional right to substantive due process was violated.”).

and fines, prohibits the infliction of "cruel and unusual punishments."²³³ The protections apply to states through the Fourteenth Amendment.²³⁴

Although not explicitly limited, most courts have historically applied the Eighth Amendment's protections only to criminal cases.²³⁵ However, in 1993, the Supreme Court in *Austin v. United States* helped open the Amendment's door to civil sanctions as well.²³⁶ In *Austin*, the Court held that the Excessive Fines Clause of the Eighth Amendment applies to in rem civil forfeiture proceedings.²³⁷ The Court explained that "[t]he notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law."²³⁸ "[T]he question is not," the Court continued, "whether forfeiture . . . is civil or criminal, but rather whether it is punishment."²³⁹ Thus, even if there is a remedial purpose, an intertwined punitive effect can still trigger the Eighth Amendment protections:

We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We, however must determine that it can only be explained as serving in part to punish [A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment²⁴⁰

Because *Austin* only considered application of the Excessive Fines Clause to civil forfeiture decisions, the decision did not directly hold that the Cruel and Unusual Punishment Clause also applies in civil contexts.²⁴¹ However, the same rejection of the criminal verses civil distinction, replaced with an analysis of whether an action is punishment regardless of the label, should logically flow to the Cruel and Unusual Punishment Clause.²⁴²

Applying the *Austin* analysis, the first question regarding termination of parental rights due to state-owed child support is whether

²³³ U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

²³⁴ *Robinson v. California*, 370 U.S. 660, 667 (1962).

²³⁵ Mary Ewing di Zerega, Note, *Austin v. United States: An Analysis of the Application of the Eighth Amendment to Civil Forfeitures*, 2 GEO. MASON L. REV. 127, 127 (1994).

²³⁶ *Austin v. United States*, 509 U.S. 602 (1993).

²³⁷ *Id.* at 604.

²³⁸ *Id.* at 610 (quoting *United States v. Halper*, 490 U.S. 435, 447-48 (1989)).

²³⁹ *Id.*

²⁴⁰ *Id.* (internal quotation marks omitted).

²⁴¹ *Id.*

²⁴² See Gregory Y. Porter, Note, *Uncivil Punishment: The Supreme Court's Ongoing Struggle with Constitutional Limits on Punitive Civil Sanctions*, 70 S. CAL. L. REV. 517, 543 (1997) ("Similarly, *Halper* and *Austin* should alter the prevailing view that the Cruel and Unusual Clause is limited to criminal proceedings. The inquiry required by *Halper* and *Austin* focuses on punishment, not on the distinction between civil and criminal sanctions"); see also *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 263 n.3 (1989) ("We left open in *Ingraham* the possibility that the Cruel and Unusual Punishment Clause might find application in some civil cases.").

the action is a form of punishment against the parent or solely remedial.²⁴³ The likelihood of convincing a court that the Cruel and Unusual Punishment clause is applicable in this context may not be high. Several state courts have already rejected arguments that termination proceedings in general result in unconstitutional cruel and unusual punishment.²⁴⁴ The decisions quickly and correctly conclude that the general intent of the termination statutes is clearly not to punish.²⁴⁵ However, clearly stated remedial intent does not necessarily remove a simultaneous, unstated punitive effect. A thorough analysis has been lacking in the decisions of whether a specific statutory grounds for termination may bring punitive treatment into the legal framework, despite the over-arching remedial purpose. As the Supreme Court in *Austin* explained, “a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment”²⁴⁶ If this is the test, the notion of retributive purpose is present in a statutory scheme that considers the failure to repay government costs as a ground for terminating parental rights.

Even if the applicability hurdle is overcome and such a statutory ground meets the punishment test, an Eighth Amendment claim must also pass the test of whether the punishment is cruel and unusual. The specific standard to address this question is unclear and has been described as a “Rorschach test,” resulting from the Supreme Court’s struggles to apply the constitutional clause in a variety of contexts.²⁴⁷

²⁴³ See also *Austin*, 509 U.S. at 610 & n.6 (“[T]he question is not, as the United States would have it, whether forfeiture . . . is civil or criminal, but rather whether it is punishment For this reason, the United States’ reliance on *Kennedy v. Mendoza-Martinez* and *United States v. Ward* is misplaced. The question in those cases was whether a nominally civil penalty should be reclassified as criminal and the safeguards that attend a criminal prosecution should be required In addressing the separate question whether punishment is being imposed, the Court has not employed the tests articulated in *Mendoza-Martinez* and *Ward*.”); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (describing the various “tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character”).

²⁴⁴ See *Vance v. Lincoln Dep’t of Pub. Welfare*, 582 So. 2d 414, 419 (Miss. 1991) (“Several states have addressed the question of whether a termination of parental rights amounts to cruel and unusual punishment.”).

²⁴⁵ *Id.* (“The action brought by the Lincoln County Welfare Department was not brought to further punish the appellant, but was a reasonable exercise of this state’s legitimate interest in providing for the welfare of these children.”); see also *In re Imani J.*, 817 N.Y.S.2d 6, 7 (N.Y. App. Div. 2006) (concluding that “respondent’s argument predicated on the Eighth Amendment ignores the reality that proceedings . . . are not punitive in nature, but rather are designed to address the needs and welfare of children”); *In re Marriage of T.H.*, 626 N.E.2d 403, 410 (Ill. App. Ct. 1993) (same).

²⁴⁶ *Austin*, 509 U.S. at 610.

²⁴⁷ See, e.g., *Johnson v. Phelan*, 69 F.3d 144, 151 (7th Cir. 1995) (Posner, J., dissenting) (“The cruel and unusual punishments clause of the Eighth Amendment to the United States Constitution, like so much in the Bill of Rights, is a Rorschach test. What the judge sees in it is the reflection of his or her own values, values shaped by personal experience and temperament as well as by historical reflection, public opinion, and other sources or moral judgment.”); James R. Adolf, *Final Passage: How New York’s Struggle Supports A Supermajority Requirement for Enactment of the Death Penalty*, 30 COLUM. J.L. & SOC. PROBS. 503, 515 (1997) (“Federal courts have struggled to define the ‘cruel and unusual punishments’ ban of the Constitution, often employing vague and

Applied in the civil context of termination of parental rights, the “gross disproportionality” test may be the most sensible,²⁴⁸ questioning whether the resulting termination of rights is overly disproportionate to the grounds considered.²⁴⁹ Nonetheless, regardless of the specific test applied, whether the Cruel and Unusual Punishment Clause prohibits termination of parental rights based upon government-owed child support is a question that justifies judicial consideration.

C. *Legal Confusion at the Crossroads*

In addition to the constitutional and federal statutory violations, foster care cost recovery policies result in several other legal concerns. The questions further illustrate the legal conflicts and confusion resulting from the child welfare system’s diverted purpose.²⁵⁰

1. Is Forced Assignment Legal Assignment?

An assignment of rights is a legally recognized form of contract with three parties: an assignor, assignee, and obligor.²⁵¹ In the context of welfare cost recovery, where custodial parents must assign their child support rights to receive welfare assistance, the custodial parent is the assignor, the state is the assignee, and the absent parent is the obligor.²⁵² In foster care cases, the required assignment of child support rights occurs differently and the status of the three parties to the assignment becomes confused. Neither parent has custody, both parents must assign their child support rights, and in involuntary child removals the parents are not voluntarily applying for benefits in exchange for the assignment. The parents are both the assignors and obligors in the same forced transaction.

conflicting tests.”); Hillary J. Massey, *Disposing of Children: The Eighth Amendment and Juvenile Life Without Parole After Roper*, 47 B.C. L. REV. 1083, 1095 (2006) (noting that “the U.S. Supreme Court’s Eighth Amendment decision making is not a model of clarity”).

²⁴⁸ E.g., *United States v. Bajakajian*, 524 U.S. 321, 336 (1998) (referring to “the standard of gross disproportionality articulated in our Cruel and Unusual Punishments Clause precedents”).

²⁴⁹ For an analysis of the applicability of the proportionality standard in Eighth Amendment cases, see Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court’s Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107 (1995-1996).

²⁵⁰ Other legal questions not discussed in this section also pose significant dilemmas. For example, when the state’s interest in cost recovery directly conflicts with the best interests of the child, whose interests trump? For a discussion of the legal conflict, see Hatcher, *Child Support*, *supra* note 11, at 1054-63.

²⁵¹ See Bryan D. Hull, *Harmonization of Rules Governing Assignments of Right to Payment*, 54 SMU L. REV. 473, 478-81 (2001) (explaining the legal framework of assignments).

²⁵² Paula Roberts, *In the Frying Pan and in the Fire: AFDC Custodial Parents and the IV-D System*, 18 CLEARINGHOUSE REV. 1407, 1407-08 (1985) (discussing the assignment process in the welfare context).

At least in theory, the process of assignment of child support rights for welfare applicants is voluntary.²⁵³ A trade-off occurs with the parent assigning her child support rights in return for the receipt of cash welfare benefits. With involuntary foster care placements, there is no choice.²⁵⁴ Rather than agreeing to trade child support rights for welfare benefits, the transfer of child support rights to the government in foster care cases is forced.²⁵⁵ Also, the requisites for a valid contract—an offer, acceptance, and consideration—can all be found or at least implied in the transaction when a parent applies for welfare and agrees to assign her child support rights. With involuntary foster care placements, there is no offer or acceptance, and the presence of adequate consideration to validate the contract is doubtful. Rather than receiving a positive return for the assignment of rights, such as cash assistance, the parent in an involuntary foster care placement loses custody of her child.²⁵⁶ Without the required elements of a valid contract, an assignment of rights based upon contract principles cannot occur.

The answer to this legal quandary is seemingly that federal law requires the assignment of child support rights; therefore, the assignments are not based in principles of contract law but simply in federal statutory requirement.²⁵⁷ Still, questions remain. The federal law requires that “where appropriate, all steps will be taken” by the state to “secure an assignment” of the parents’ child support rights.²⁵⁸ With no guidance explaining how the assignments are to be secured, many states have simply enacted statutes that automatically assign child support rights when foster care services are received.²⁵⁹ The notion of statutorily

²⁵³ However, in my prior work as a legal aid lawyer, I encountered many clients who felt they had no choice because of the desperate need for cash assistance, and others who indicated that they were unaware that their child support rights were assigned to the state at the time they applied for welfare benefits.

²⁵⁴ States also have procedures to allow voluntary placements, where the parent makes a choice to place the child in state custody.

²⁵⁵ 42 U.S.C. § 671(a)(17) (2006).

²⁵⁶ Parents of foster children do receive services from the child welfare agency after child removal. However, this is certainly not the type of bargained for exchange contemplated in contract law.

²⁵⁷ 42 U.S.C. § 671(a)(17).

²⁵⁸ *Id.*

²⁵⁹ *E.g.*, N.D. CENT. CODE § 50-09-06.1 (2009) (providing that “[a]n application under this chapter is deemed to create and effect an assignment of all rights to support, which a family member or foster child may have or come to have, to the state agency”). How the “application” in an involuntary foster care cases is contemplated is uncertain. However, some states may attempt to “secure assignments” without legal authority. For example, although Maryland regulation requires the pursuit child support against the parents of foster children and explains the support should be used to reimburse government costs of care, MD. CODE REGS. 7.2.11.26(L) (2009), statutory authority for the regulatory requirement seems lacking. Statutory authority exists for a court to order the parents to reimburse the costs of care, MD. CODE ANN., CTS. & JUD. PROC. § 3-819(*l*) (West 2009), and to refer the parents for child support enforcement services, *id.* § 3-822, but not to assign the resulting child support to the government. The Maryland child support agency is provided statutory authority to enforce assigned child support obligations, but only child support assigned as the result of the receipt of cash welfare assistance, not foster care services. *Id.*, FAM. LAW § 10-108; *id.*, HUMAN SERVS. § 5-312.

created debts requiring parents to reimburse government costs of services for their children is not new. States have often required parents to pay for the institutionalization of their children through parental responsibility statutes that create statutory debts owed by the parents.²⁶⁰ Thus, federal law could have required the creation of such statutory parental debts for children in foster care without any required assignment of already existing child support rights. But by including the assignment requirement, Congress sought more than a simple statutory debt.

The difference does not lie solely in the semantics. Requiring assignment of child support rights rather than establishing a regular debt evidences the government's desire to maintain the special status of the child support obligation, even when no longer owed to the child. Unlike regular debts, the child support obligation benefits from heightened enforcement tools, such as the ability to garnish up to 65% of wages,²⁶¹ the threat of incarceration prohibited by state constitutions for other debts,²⁶² and the full power and resources of IV-D child support enforcement offices.²⁶³ To maintain such unique legal status of assigned rights in the hands of an assignee, the principles of contractual assignment law would seem to be required.

To add another layer to the consideration, a basic question about child support is often overlooked: who possesses the rights to child support—the child, the parent, or both? Although few courts have considered who owns the rights in a direct dispute between the custodial parent and child, many courts indicate that child support rights primarily belong to the child.²⁶⁴ If the child either owns or co-owns the rights, the

²⁶⁰ *E.g.*, 59 A.L.R.3d 636 (liability of parent for support of child institutionalized by juvenile court.).

²⁶¹ 15 U.S.C. § 1673(b)(2) (2006).

²⁶² *See, e.g.*, MD. CONST. art. III, § 38 (West 2006) (“[S]upport of a spouse or dependent children, or for the support of an illegitimate child or children, or for alimony . . . shall not constitute a debt within the meaning of this section.”).

²⁶³ Bankruptcy decisions further illustrate the distinction between statutory debts to reimburse costs of care and assigned child support rights. The decisions explain that a state's right to reimbursement through a statutory debt is not the equivalent of an assignment of child support for purposes of the discharge exception statute, and thus the statutory debts were dischargeable whereas assigned child support is not. *E.g.*, *County of Oakland v. Fralick*, 215 B.R. 132, 134 (W.D. Mich. 1997); *Saafir v. Kansas Dep't of Soc. Servs.*, 192 B.R. 964, 969 (D. Neb. 1996).

²⁶⁴ *E.g.*, *Hall v. Hall-Stradley*, 776 P.2d 1166, 1167 (Colo. Ct. App. 1989) (explaining that “the beneficial owner of the child support payments is the child, not the custodial parent”); *Serio v. Serio*, 830 So. 2d 278, 280 (Fla. Dist. Ct. App. 2002) (“It is well settled that parents may not waive their children's right to support because that right belongs to the children.”); *Kibble v. Weeks Dredging & Constr. Co.*, 735 A.2d 1142, 1150 (N.J. 1999) (“That the right to child support belongs to the child and not to the custodial parent is a fundamental principle of family law. Accordingly, the right to child support ‘cannot be waived by the custodial parent.’” (quoting *Pascale v. Pascale*, 660 A.2d 485, 485 (N.J. 1995))) (citations omitted); *cf. Bornemann v. Bornemann*, 931 A.2d 1154, 1163-64 (Md. Ct. Spec. App. 2007). The *Bornemann* court rejected the argument that post-age 18 child support payments should be paid directly to a child rather than custodial parent:

[A]ppellant suggests not only that Adam must be a party, but that the post-age 18 support payments should be made directly to Adam, not to his mother. We find no support for that proposition. Child support enables the custodial parent to provide the necessities of life for a minor child—food, shelter, clothing, etc. . . . To suggest that child support should

logic regarding assignment becomes further muddled.²⁶⁵ The rights of mistreated children are assigned by the parents responsible for the mistreatment. Absent a valid contractual agreement to assign child support rights, and with questions regarding whose rights can be properly assigned even were a contractual agreement in place, a takings analysis may be warranted.²⁶⁶

2. Misguided Guidelines

Courts initially possessed wide discretion in setting child support amounts by simply considering children's needs and their parents' financial circumstances.²⁶⁷ The case-by-case approach resulted in widely varying support awards and was often criticized.²⁶⁸ In 1984, Congress responded to the concerns and enacted legislation requiring each state to establish guidelines for determining child support awards.²⁶⁹ The guidelines then became binding with the enactment of the Family Support Act of 1988, which mandated states to make application of the required guidelines a "rebuttable presumption."²⁷⁰

Responding to the mandate, states established a variety of approaches to structuring the child support guidelines,²⁷¹ but all of the

be paid directly to a child, even assuming adulthood, where his necessities are being provided by a custodial parent, flies in the face of logic and the stated public policy of providing for minor children. . . . Unless it can be shown that a child, during the period between his or her 18th birthday and one of the other statutory terminating conditions, is responsible for his or her own necessities, post age 18 child support payments . . . must be made to the child's custodial parent or guardian, not to the child.

Id.

²⁶⁵ Moreover, once the assignment is imposed upon the child, the corresponding obligation is often court ordered in the name of one of the parents against the other for payments that are owed by both of the parents to the government. New cases are initiated in the name of one of the parents, or existing orders are simply continued without change, but the payments are routed to the state as the real party in interest without the state being named in the order. Over thirty years ago, a family court in New York noticed the nonsensicalness and concluded a state agency could not litigate a child support obligation in the name of a parent when the state is the real party in interest. *Chauvaux v. Chauvaux*, 371 N.Y.S.2d 989 (N.Y. Fam. Ct. 1975).

²⁶⁶ For such a takings analysis regarding the practice of foster care agencies taking children's Social Security benefits to reimburse costs, see Hatcher, *Foster Children*, *supra* note 12, at 1838.

²⁶⁷ Ira Mark Ellman & Tara O'Toole Ellman, *The Theory of Child Support*, 45 HARV. J. ON LEGIS. 107, 110-11 (2008) (citing LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 1.01 (1996)).

²⁶⁸ *Id.*; Irwin Garfinkel, Sara McLanahan & Judith Wallerstein, *Visitation and Child Support Guidelines: A Comment on Fabricius and Braver*, 42 FAM. CT. REV. 342, 346 (2004) ("In the 1970s, child support awards in nearly all states were determined on a case-by-case basis by a judge in a judicial hearing. This system led to grave inequities and dissatisfaction, in large part because people in identical circumstances were treated very differently.").

²⁶⁹ Garfinkel et al., *supra* note 268, at 346.

²⁷⁰ Family Support Act of 1988, Pub. L. No. 100-485, § 103(a), (b), 102 Stat. 2346 (1988); Garfinkel et al., *supra* note 268, at 346.

²⁷¹ See Marsha Garrison, *Autonomy or Community? An Evaluation of Two Models of Parental Obligation*, 86 CAL. L. REV. 41, 60-62 (1998) (describing the various child support guidelines models).

approaches followed a basic assumption: the guidelines consider the circumstances of two parties, the noncustodial parent and the custodial parent, and the result is a child support award that is payable to the custodial parent. The guidelines generally do not contemplate the circumstances of assigned support in foster care cases where there are two noncustodial parents who owe support to the state.²⁷²

States typically ignore this poor fit and apply the same child support guidelines to establish child support obligations against the parents of foster children as in all other child support cases.²⁷³ Although a simple solution, complexities result. Federal law dictates that state guidelines must be presumptively correct.²⁷⁴ However, the law also directs that courts have discretion to deviate from the guidelines when their application would be “unjust or inappropriate.”²⁷⁵ Federal regulation then clarifies that the “unjust or inappropriate” determination “must take into consideration the best interests of the child.”²⁷⁶

Applying this framework to foster care cases creates a paradoxical scenario. Because the child support is owed to the government, the children generally receive no benefit from payments.²⁷⁷ In many cases, reunification with the parents may be in the best interests of the child but the pursuit of assigned child support conflicts with the

²⁷² *In re Joshua W.*, 617 A.2d 1154, 1159 (Md. Ct. Spec. App. 1993). The court details the dilemma of how the guidelines do not fit the circumstances of foster care cases:

[T]he Income Shares Model does not seem to address situations where the child is placed in foster care with neither parent having physical custody of the child. Other models of calculating child support also focus on the typical child support situation with one custodial parent. For example, the Wisconsin Percentage of Income Standard “assumes that each parent will expend the designated proportion of income on the child, with the custodial parent’s proportion spent directly.” . . . Only the Delaware Melson Formula seems to lend itself to situations in which there are two noncustodial parents. This model is premised on allowing parents to retain sufficient income for their most basic needs. . . . Like the other models, however, the Delaware model eventually returns to a discussion of custodial and noncustodial parents and how the child’s support needs are allocated between them. The language of the child support guidelines similarly does not directly address the situation involved here. The guidelines discuss dividing the basic child support obligation and other expenses between the parents with the “noncustodial” parent owing the support obligation to the “custodial” parent. Furthermore, the guidelines refer only to cases of sole custody and shared physical custody.

Id.

²⁷³ *Id.* (holding that the guidelines should be used for foster care cases); *see also* Dutchess County Dep’t of Soc. Servs. *ex rel. Day v. Day*, 749 N.E.2d 733 (N.Y. 2001) (same).

²⁷⁴ 42 U.S.C. § 667(b)(2) (2000).

²⁷⁵ *Id.* (“There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award . . . is the correct amount of child support to be awarded. A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the State, shall be sufficient to rebut the presumption in that case.”).

²⁷⁶ Guidelines for Setting Child Support Awards, 45 C.F.R. § 302.56(g) (2006).

²⁷⁷ Although assigned child support is owed to the government, the government may only keep the amount of child support that does not exceed the amount of government assistance provided. 42 U.S.C. § 657(a)(1) (2000).

reunification goal.²⁷⁸ Further, even if reunification is not possible, collecting government-owed child support may still harm the child's interests. Without the government debt obligation, parents may be more likely to provide other informal support to the child while in foster care²⁷⁹ and direct child support payments to the child after leaving care.²⁸⁰

Thus, the federally required consideration of the best interests of the children in decisions whether to deviate downward from the child support guidelines should mandate that most, if not all, foster care cases receive a downward departure. If best interests of the children are the true guide, the resulting order amounts should be set at zero.

3. Cost Recovery in State-Funded Foster Care

If the validity of the legal process of pursuing assigned child support in IV-E foster care cases is unclear, the process of seeking child support to reimburse government costs in state-funded foster care is even more in doubt. As explained in the Part I.B.4, federal law only requires states to pursue child support obligations to reimburse foster care costs in cases where the child is eligible to receive IV-E federal foster care assistance.²⁸¹ There is no federal law that requires the assignment of child support in state-funded foster care cases or that allows the use of the IV-D child support system to enforce such obligations. Rather, the only framework for the cost recovery process in these non-IV-E foster care cases is a series of informal federal communications.

Most recently, a 2007 Information Memorandum from the HHS Administration of Children and Families included limited guidance for cost recovery in state-funded foster care cases.²⁸² The communication first explained that

[w]hile section 471(a)(17) of the Social Security Act grants title IV-E agencies authority "to secure an assignment to the State of any rights to support on behalf of each child receiving foster care maintenance payments[,"] this authority cannot be exercised on behalf of children who are not receiving title IV-E payments.²⁸³

"However," the guidance continued, "a different process may be pursued according to existing OCSE [Office of Child Support Enforcement] policy" for seeking child support in the state-funded foster care.²⁸⁴ The guidance cites to a Program Instruction and Action Transmittal issued a

²⁷⁸ See *supra* notes 78-80 and accompanying text.

²⁷⁹ See Hatcher, *Child Support*, *supra* note 11, at 1069.

²⁸⁰ Because of the likelihood of arrearages still owed, assigned child support is often still pursued after a child leaves foster care, thus reducing the ability of a parent to pay current child support directly to the child.

²⁸¹ 42 U.S.C. § 671(a)(17).

²⁸² See ACF INFO. MEMO., *supra* note 28.

²⁸³ *Id.* (quoting Social Security Act, 42 U.S.C. § 671(a)(17)).

²⁸⁴ *Id.*

few months earlier,²⁸⁵ which explained state discretion to seek assignments of child support for non-TANF funded assistance.²⁸⁶ “[A] State would have to take an assignment in accordance with its own statutory authority,” the transmittal explained, and could then utilize the federally funded IV-D child support program to enforce the assigned child support obligation.²⁸⁷

The lack of statutory or regulatory authority for this informal process raises Administrative Procedures Act (APA) concerns.²⁸⁸ Further, even if the network of non-regulatory communications can survive APA scrutiny, the process contains unworkable logistics. The federal child support distribution rules only allow child support to be paid to the government when assigned pursuant to federal law.²⁸⁹ In state-funded foster care cases, the assignments occur solely by state process.²⁹⁰ Thus, even if the assignments are valid under state law, the federal distribution rules governing the IV-D child support program prohibits the distribution of any collected payments to the state government.²⁹¹

Apparently recognizing the dilemma, but again with no statutory or regulatory authority, the federal agency cites to multiple prior Policy Interpretation Questions (PIQ’s) as authority for explaining that custodial parents are free to request that child support payments distributed to the parents be re-routed to a different entity.²⁹² Thus, the guidance explained that to bypass the federal distribution rules, all that states need to do is require the parents to sign agreements redirecting payments distributed

²⁸⁵ *Id.* at pt. IV (citing ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP’T OF HEALTH & HUMAN SERVS., PROGRAM INSTRUCTION & ACTION TRANSMITTAL, TANF-ACF-PI-2007-02, OCSE-AT-2007-02 (2007) [hereinafter PROGRAM INSTRUCTION & ACTION TRANSMITTAL], available at <http://www.acf.hhs.gov/programs/cse/pol/AT/2007/at-07-02a.PDF>).

²⁸⁶ PROGRAM INSTRUCTION & ACTION TRANSMITTAL, *supra* note 285, at 4. Apparently, the policy is also intended by the guidance to apply to state discretion to seek assignments of child support for non-IV-E foster care.

²⁸⁷ *Id.*

²⁸⁸ The Administrative Procedure Act generally requires that for an agency rule to be binding, notice of proposed rulemaking must be published in the Federal Register, and interested persons must be allowed the opportunity to provide comments for agency consideration. 5 U.S.C. § 553(b)-(c) (2006). However, exemptions from the notice and comment requirements may be available where an agency communication is not substantive but rather only interpretive or a policy statement. *Id.* Determining whether an agency communication is merely interpretive or a policy statement rather than substantive is often difficult. *See, e.g.,* Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1708-09 (2007) (“[T]he distinction between rules that must be promulgated via notice and comment rulemaking and those that need not has been called ‘fuzzy,’ ‘tenuous,’ ‘baffling,’ ‘blurred,’ and ‘enshrouded in considerable smog.’ As one prominent professor has noted, ‘[t]he subject of nonlegislative rules breeds bewilderment and frustration.’” (quoting Robert A. Anthony, “Interpretive” Rules, “Legislative” Rules and “Spurious” Rules: Lifting the Smog, 8 ADMIN. L. J. AM. U. 1, 6 (1994))). *See generally* William Funk, *When is a “Rule” a Regulation? Marking a Clear Line Between Nonlegislative Rules and Legislative Rules*, 54 ADMIN. L. REV. 659 (2002).

²⁸⁹ *See* 42 U.S.C. § 657 (2000) (only allows distribution of child support payments to the state or federal government up to the amount of “assistance” received by the family, with “assistance” defined as only TANF or IV-E benefits).

²⁹⁰ PROGRAM INSTRUCTION & ACTION TRANSMITTAL, *supra* note 285, at 4.

²⁹¹ *Id.* at 6.

²⁹² *Id.*

from the state agency to the parents back to the state again.²⁹³ Or as the guidance also provided, a state may “direct the IV-D program to send support collections, distributed to [the child] under [the federal distribution requirements] but assigned to the State under State law, to the [state agency].”²⁹⁴

Setting aside the circularity of the attempted end-run around the federal distribution rules, were a parent voluntarily applying for state-funded services as in voluntary foster care placements, such a requirement at least makes some logistical sense. However, in circumstances where a child is involuntarily removed, the parents are not actively seeking or applying for foster care services. If the parent simply refuses to sign such agreement to re-route the distributed child support payments back over to the state government, the only apparent recourse would be to deny foster care services and return the child to the parent who opposed removal in the first place.

Thus, in addition to unconstitutional practices and conflicts with federal law, child welfare agency efforts to recover foster care costs through child support enforcement result in several unresolved legal questions. Recommendations to address the legal concerns and questions, as well as the policy implications discussed in Part II, are set out below in Part IV.

IV. CONCLUSION AND SUGGESTIONS FOR REFORM

A collaboration of the child welfare and child support programs should help—not harm—the beneficiaries of the agencies’ core missions. The federally required cost recovery effort inserts a self-interested fiscal pursuit that subverts the agencies’ purposes of serving the interests of children and their parents. The diversion is not subtle in its effect. Foster care cost recovery through child support enforcement harms the best interests of children, undermines family reunification efforts, is fiscally unsound, and results in both illegality and legal confusion.

The cost recovery requirements should be eliminated, along with the required assignment of child support rights, so that when child support is pursued the payments will be directed to benefit the children.²⁹⁵ Still, caution will be necessary to ensure the decision to initiate child support only occurs when not in conflict with case-planning goals and after all the parties’ interests have been properly considered. For example, if a child has been temporarily placed in foster care with a plan of reunification with the mother, the mother might decide, in consultation with her caseworker, that seeking child support from the

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ In addition to the elimination of the assignment requirement, child support distribution rules would also need to be clarified so that receipt of IV-E benefits no longer triggers distribution of child support payments to the government.

absent father could provide a needed resource available to her and the child after the reunification occurs. However, if the case-plan is to encourage possible reunification with either the mother or the father, pursuing child support will likely be ill advised.²⁹⁶ If reunification is no longer an option with either parent, a choice could be made to pursue child support if in the child's best interests. The child support could be used to improve the child's care by directing the payments to increase the inadequate financial assistance provided to the child's foster parents.²⁹⁷ Or, the payments could be conserved in trust to assist the child with the difficult transition to independence after aging out of foster care.²⁹⁸

The elimination of foster care cost recovery through child support enforcement, while necessary to bring child support policy in line with the child welfare system's primary missions, will be politically difficult. The cost recovery focus has long been entrenched in the fiscal mindset of Congress and the states. Thus, short of the complete elimination of the policy, several reforms are still possible to begin the needed realignment.

Federal law already provides significant discretion in whether to "secure an assignment" of child support rights in order to reimburse government costs.²⁹⁹ Unfortunately, the discretion is not mandatory and is often not used. Congress should thus amend the federal statute to require states to exercise discretion and only refer foster care cases for child support enforcement if not contrary to the children's best interests or in conflict with case-planning goals. If reunification is a possibility, a child support referral should not occur. Further, federal law should also rectify current illegal practices by prohibiting the insertion of government-owed child support into required case plans, and by clarifying that the assigned child support may not be grounds for terminating parental rights.

If Congress does not act, states should. In addition to ensuring that state practices do not include the cost recovery debt in reunification plans or in termination of parental rights procedures, states should implement available discretion regarding child support referrals.

²⁹⁶ If child support is initiated against only one of the parents then the obligation could unfairly tilt the likelihood of reunification toward one parent over the other. And cross-child support obligations against both parents could reduce the chances of reunification with either parent. It is possible however, that in some circumstances where the parents both have the ability to pay a small support amount, the payments could be pursued and conserved as a resource made available to whichever parent later achieves reunification.

²⁹⁷ See Barbara Bennett Woodhouse, *Horton Looks at the ALI Principles*, 4 J.L. & FAM. STUD. 151, 162 (2002) ("Foster care payments are dismally low and cannot cover the real costs of child rearing.").

²⁹⁸ See generally Michele Benedetto, *An Ounce of Prevention: A Foster Youth's Substantive Due Process Right to Proper Preparation for Emancipation*, 9 U.C. DAVIS J. JUV. L. & POL'Y 381, 387 (2005) (discussing the many difficulties foster children face after aging out of care); Katherine M. Swift, *A Child's Right: What Should the State be Required to Provide to Teenagers Aging Out of Foster Care?*, 15 WM. & MARY BILL RTS. J. 1205, 1207 (2006) (same); Melinda Atkinson, Note, *Aging Out of Foster Care: Towards a Universal Safety Net for Former Foster Care Youth*, 43 HARV. C.R.-C.L. L. REV. 183, 187-95 (2008) (same).

²⁹⁹ 42 U.S.C. § 671 (a)(17) (2000).

California provides a possible model, requiring that local child welfare offices “shall determine whether it is in the best interests of the child to have the case referred to the local child support agency for child support services.”³⁰⁰ The state law only allows the referral for child support enforcement “[i]f reunification services are not offered or are terminated.”³⁰¹ Moreover, in addition to such required considerations in California, individuals contesting child support referrals should be provided the opportunity to be heard and the right to appeal.

Finally, if child support obligations are initiated in foster care cases, states should take full advantage of recent amendments in the Deficit Reduction Act of 2005.³⁰² The Act provides improved state options to reduce the negative effect of child support assignment requirements, including an incentive to “pass through” assigned child support back to children and their families.³⁰³ Although the “pass through” option is primarily promoted as a benefit to custodial parents receiving cash welfare assistance under the TANF program,³⁰⁴ states may also be able to use the option to benefit children in foster care.³⁰⁵

The reforms suggested here are necessary to address the policy concerns and illegal practices that currently lie at the intersection of foster care and child support. Reunification goals should not be undermined, case-plans intended to help families should not be converted

³⁰⁰ CAL. FAM. CODE § 17552 (2006).

³⁰¹ *Id.*; see also OHIO REV. CODE ANN. § 2151.361 (2007) (requiring the consideration of several factors prior to initiating a child support obligation in foster care cases, including: “(1) The ability of the parents to pay for the care, support, maintenance, and education of the child; (2) The chances for reunification of the parents and child; (3) Whether issuing the order will encourage the reunification of the parents and child or undermine that reunification”).

³⁰² Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006) (codified as amended in scattered sections of 42 U.S.C.).

³⁰³ In addition to the new “pass through” option, including federal participation in the passed through amounts, a new option is also available that allows states to distribute federal tax refund intercepts to families first when back child support arrearages are both owed to the government and the family. *Id.*, 120 Stat. at 141-42.

³⁰⁴ Publications addressing state implementation of the DRA child support options discuss the benefits in TANF cases but do not mention foster care cases. See, e.g., CTR. ON BUDGET & POLICY PRIORITIES & CTR. FOR LAW & SOC. POLICY, IMPLEMENTING THE TANF CHANGES IN THE DEFICIT REDUCTION ACT: “WIN-WIN” SOLUTIONS FOR FAMILIES AND STATES 7-14 (2006), available at <http://www.cbpp.org/5-9-06tanf.pdf>; Vicki Turetsky, CTR. FOR LAW & SOC. POLICY, CHILD SUPPORT PROVISIONS IN THE DEFICIT REDUCTION ACT (2007), available at http://clasp.org/publications/dra_cs_csda_91907.pdf. However, language in the federal statute allowing the pass through of assigned child support, 42 U.S.C. § 657, is available for families currently or formerly receiving “assistance,” defined as including both TANF and also IV-E foster care assistance. 42 U.S.C. § 657(c)(1). Thus, states should be able to take advantage of current pass through options in foster care cases without need for federal statutory amendment.

³⁰⁵ Rather than keeping the assigned child support to reimburse government costs, at least a portion of the payments could be given back to the children to serve their individual needs while in foster care or to save for the future transition to independence. For a former state child support agency leader’s plea to use child support in foster care cases to benefit the children, see *Hearing on Federal Foster Care Financing Before the Subcomm. on Income Security and Family Support of the H. Comm. on Ways and Means*, 109th Cong. (2005) (statement of Frank Richards, former Deputy Associate Commissioner of Child Support Enforcement Services in New York City), available at <http://waysandmeans.house.gov/hearings.asp?formmode=view&id=3162>.

into debt collection tools, and parents should not lose their children for money owed to the government. And if child support is pursued, the children should benefit. Promise lies in a strengthened partnership between child welfare and child support agencies, but only if the agency missions are preserved.